

8-1-1987

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Recommended Citation

Jonathan C. Averbach, *Comparing the Old and the New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language – Same Results?*, 14 B.C. Env'tl. Aff. L. Rev. 601 (1987), <http://lawdigitalcommons.bc.edu/ealr/vol14/iss4/3>

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COMPARING THE OLD AND THE NEW POLLUTION EXCLUSION CLAUSES IN GENERAL LIABILITY INSURANCE POLICIES: NEW LANGUAGE—SAME RESULTS?

Jonathan C. Averbach*

I. INTRODUCTION

The availability of business insurance proceeds benefits both parties seeking compensation for injuries and parties desiring protection from such claims. Insurance provides plaintiffs with a source for damage awards while also providing defendant businesses with a way to survive large, fortuitous losses.¹ Similarly, in environmentally-related lawsuits, insurance can be a potential resource both to compensate victims of pollution and to finance clean up of pollutants.² Obtaining pollution insurance may be difficult, however, since insurance companies as well as businesses seeking insurance find unat-

* Citations Editor, 1986-87, *Boston College Environmental Affairs Law Review*.

¹ This Comment analyzes liability insurance policies, under which insurers indemnify businesses from liability to third parties. When this Comment discusses insurance in general, it does not refer to first-party insurance policies, which indemnify policyholders for their physical injuries or damage to their own property. For a comparison of how policies operate, see generally Note, *Insurance and Its Role in the Struggle Between Protecting Pollution Victims and the Producers of Pollution*, 31 *DRAKE L. REV.* 913, 916-22 (1982).

² Several of the cases analyzed in this Comment relate to claims against insurers by defendants in suits under both the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6991i (1982 & Supp. III 1985), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), §§ 9601-9657 (1982) as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1613. See, e.g., *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984) (underlying CERCLA decision: *United States v. Ottatti & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985)); *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984) (underlying CERCLA case: *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983)).

tractive those policies specifically designed to insure pollution.³ This Comment reviews standardized general business insurance policies, which are not designed specifically to insure pollution, as sources of insurance proceeds for companies faced with contamination-related damage claims.

Insurance companies often use standardized, industry-wide contracts⁴ to insure businesses for certain types of damages. One such standardized insurance contract was the Comprehensive General Liability Policy of 1973 ("Comprehensive policy").⁵ While this policy provided coverage for most injuries to third parties, the policy attempted to limit insurability of pollution-related injuries.⁶ The method by which insurers sought to limit their liability was through a standardized clause that became known as the "pollution exclusion clause."⁷ The language of this clause appeared to eliminate the insurability of all pollution injuries except those that were, in the words of the policy, "sudden and accidental."⁸

Courts, however, will sometimes expand the definition of what is insured under standardized contracts beyond the intent of the industry.⁹ By finding the terms of the pollution exclusion clause am-

³ See Sparrow, *Hazardous Waste Insurance Coverage: Unexpected Past, Uncertain Future*, 64 MICH. B.J. 169, 171-73 (1985). Policies specifically designed to insure pollution are called "Environmental Impairment Liability" ("EIL") policies or "Pollution Liability Insurance" ("PLI") policies. This Comment does not address how these policies are interpreted for a number of reasons. First, at the present time, there is no reported case law interpreting such contracts. Second, EIL/PLI policies generally have had little success on the market. *Id.*; see also Notice of Proposed Rulemaking on Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities: Liability Coverage, 50 Fed. Reg. 33,902, 33,904 (1985) [hereinafter Liability Coverage Standards] (notes decrease in the number of insurers offering EIL/PLI policies and the high cost of such policies); Last, *Tort and Insurance Issues*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,252, 10,254 (1985) (identifies withdrawal of a major insurance group from the market for EIL/PLI policies as the "final blow" to such policies). Third, the general business liability policies that are the focus of this Comment most likely will be more frequently litigated in the future than EIL/PLI policies. See Last, *supra*, at 10,254; *Developments in the Law—Toxic Waste Litigation: VIII. Bankruptcy and Insurance Issues*, 99 HARV. L. REV. 1573, 1578 (1986) [hereinafter *Developments in the Law*].

⁴ See *infra* notes 24-29 and accompanying text for a discussion of the reasons insurers adopt standardized contract forms.

⁵ See M. RHODES, 1 COUCH ON INSURANCE 2D (rev. ed.) § 1.72 (1984) [hereinafter COUCH] for the entire Comprehensive policy. See *infra* notes 24-67 and accompanying text for a discussion of the development of this policy.

⁶ See *infra* notes 55-64 and accompanying text.

⁷ The Comprehensive policy designates the clause as "exclusion (f)" in the section of the policy containing "exclusions." See 1 COUCH, *supra* note 5, § 1.72.

⁸ See *infra* notes 58-64 and accompanying text; see also ABA Committee on Business Liability Insurance, *Liability Insurance Against Environmental Damage: A Status Report—June 1982*, 38 BUS. LAW. 217, 221 (1982) [hereinafter *Status Report*].

⁹ See Sparrow, *supra* note 3, at 170; Tyler & Wilcox, *Pollution Exclusion Clauses: Problems*

biguous, courts permitted businesses to recover for a broad range of contamination-related injuries under the Comprehensive policy.¹⁰ Insurers became a financial resource for damage payments even though the industry and its supporters claimed that these court decisions hampered efforts to limit pollution.¹¹

The failure of the pollution exclusion clause in the Comprehensive policy to limit the insurability of pollution has led to a redrafting of the pollution exclusion clause in a new general business liability policy, the Commercial General Liability Policy of 1985 ("Commercial policy").¹² The new pollution exclusion clause omits the ambiguous phrase "sudden and accidental," but nevertheless it may be open to similar judicial limitation like the old pollution exclusion clause when it is eventually tested.¹³

This Comment focuses on how and why courts interpret general business insurance policies as requiring insurers to pay on behalf of insureds the cost of contamination-related injuries. It analyzes case law interpreting both the Comprehensive policy and its original pollution exclusion clause to gain insights into how courts may limit recoveries for contamination-related injuries under the Commercial policy and its new pollution exclusion clause. First, the Comment highlights the development of general liability insurance and provisions relating to pollution injuries.¹⁴ Those terms, industry practices, and canons of construction that define insurable contamination under the Comprehensive policy will receive special attention.¹⁵ The Comment will review how courts have interpreted the Comprehensive policy's pollution exclusion clause, first by looking at the issues on

in *Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 499-500 (1981); see also Obremski, "Toxic Tort" Litigation and the Insurance Coverage Controversy, 34 FED'N INS. COUNS. Q. 3, 13-22 (1983) (discussing methods that courts use to hold insurers liable for asbestos-caused injuries).

¹⁰ This Comment uses the phrase "contamination-related injury" to describe any bodily injury or property damage arguably connected to an activity described by the pollution exclusion clause, regardless of whether the activity was sudden and accidental. See *infra* notes 105-65 and accompanying text for a description of the methods used by courts to determine that insurers were liable for many contamination-related injuries under the Comprehensive policies.

¹¹ See Adler & Broiles, *The Pollution Exclusion: Implementing the Social Policy of Preventing Pollution Through the Insurance Policy*, 19 LOY. L.A.L. REV. 1251, 1251-52 (1986); Tyler & Wilcox, *supra* note 9, at 520; Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1240 (1986).

¹² See *infra* notes 266-80 and accompanying text.

¹³ See *infra* notes 281-329 and accompanying text.

¹⁴ See *infra* notes 24-67 and accompanying text.

¹⁵ See *infra* notes 68-101 and accompanying text.

which there is a judicial consensus¹⁶ and then by looking at questions on which courts vary.¹⁷ One point of this review is to note that courts make decisions in this area based not only on the "sudden and accidental" phrase but also on another phrase in the pollution exclusion clause that describes what constitutes pollution.¹⁸ A second conclusion drawn in this section will be that some of the decisions that interpret the pollution exclusion clause overemphasize the "sudden and accidental" language and do not read this language in its context within the Comprehensive policy.¹⁹ This review of case law under the Comprehensive policy will indicate potential issues involving the new Commercial policy and its pollution exclusion clause.²⁰ After reviewing the new Commercial policy language,²¹ the analysis will conclude that the problems in the definition of pollution in the Comprehensive policy which rendered its pollution exclusion clause ineffective are still present in the new Commercial policy.²² The Comment will then reevaluate the criticism of some writers that the holdings in this area minimize economic incentives to limit pollution. The analysis will conclude that in a number of situations, treating contamination injuries as insurable helps promote a cleaner environment.²³

II. THE DEVELOPMENT OF THE POLLUTION EXCLUSION CLAUSE

A. History and Use of General Liability Policies

Insurance companies adopt standardized insurance contracts because such contracts are simpler to interpret and more efficient operationally than individualized contracts for each insurer and each insured.²⁴ The Comprehensive General Liability Policy of 1973 and the Commercial General Liability Policy of 1985 are two examples of standardized insurance policies.²⁵ Uniform language in standard-

¹⁶ See *infra* notes 105-65 and accompanying text.

¹⁷ See *infra* notes 179-258 and accompanying text.

¹⁸ See *infra* notes 105-44 and accompanying text.

¹⁹ See *infra* notes 248-58 and accompanying text.

²⁰ See *infra* notes 281-329 and accompanying text.

²¹ See *infra* notes 266-80 and accompanying text.

²² See *infra* notes 281-329 and accompanying text.

²³ See *infra* notes 330-57 and accompanying text.

²⁴ See R. KEETON, INSURANCE LAW § 2.10(a) (1971); Obremski, *supra* note 9, at 9.

²⁵ For the text of the Comprehensive policy, see 1 COUCH, *supra* note 5, § 1.72. For the text of the Commercial policy, see Insurance Services Office, Commercial General Liability Program Edition 11-85: Explanatory Memorandum [hereinafter Explanatory Memorandum].

ized contracts makes estimating insured risks easier for the industry because once one court construes such a contract, each insurer can apply that decisional law in evaluating the potential for loss under its contracts of the type involved in the case.²⁶

The problem with standardized contracts is that, to make them apply to many different businesses, drafters must write them in general language. Unfortunately for insurers, the meaning of generally-worded standardized policies may appear ambiguous when courts apply such policies to particular events.²⁷ As a result, courts often interpret the generalized language differently than the insurer might have intended.²⁸ The Comprehensive policy's ambiguity has led to a series of decisions expanding the types of risks for which the insurer must pay.²⁹

The drafters of the Comprehensive policy revised it several times to reflect the needs of the insurance industry.³⁰ The organization that drafted the two policies serving as the major focus of this Comment is the Insurance Services Office (I.S.O.).³¹ I.S.O. is a private association of insurance companies that assists its members in drafting policies and in estimating risks involved in insuring particular clients.³²

I.S.O. and predecessor organizations³³ have drafted three versions of standardized general business insurance policies relevant to this Comment. These policies are the Comprehensive General Liability

²⁶ Cf. Ward, *Policy Simplification*, 1959 INS. L.J. 535, 542 (simplified standardized policy language encourages uniform rulings in different states); Note, *The Calculus of Insurer Liability in Asbestos-Related Disease Litigation: Manifestation + Injurious Exposure = Continuous Trigger*, 23 B.C.L. REV. 1141, 1147 (1982) ("The [Comprehensive policy] . . . facilitates risk distribution by standardizing the type of risk insured").

²⁷ See Obremski, *supra* note 9, at 9.

²⁸ For a discussion of how courts construe ambiguities in the Comprehensive policy against insurers in toxic tort and asbestos litigation, see generally *id.* at 11-32.

²⁹ See, e.g., *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479, 482 (3d Cir. 1981); *United States Fidelity & Guar. Co. v. Armstrong*, 479 So. 2d 1164, 1168 (Ala. 1985); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714-15, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983).

³⁰ See Hourihan, *Insurance Coverage for Environmental Damage Claims*, 15 FORUM 551, 552-53 (1980); Smith, Rodburg & Chesler, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 11 CHEM. WASTE LITIGATION REP. 324, 330 (1986).

³¹ Hurwitz & Kohane, *The Love Canal—Insurance Coverage for Environmental Accidents*, 50 INS. COUNS. J. 378, 378 (1983); Tyler & Wilcox, *supra* note 9, at 499 n.21; Explanatory Memorandum, *supra* note 25, at 1-3.

³² Telephone interview with Domenick J. Yezzi, Jr., Assistant Manager, Industry Relations at I.S.O. (Dec. 31, 1985).

³³ The National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau. Hourihan, *supra* note 30, at 553.

Policy of 1966, the Comprehensive General Liability Policy of 1973, and the Commercial General Liability Policy of 1985.³⁴

The overall structure of each policy is similar. All three policies define their "coverage"³⁵ by first stating a broad description of covered injuries and then limiting coverage by setting out events not covered.³⁶ The broad description of coverage is the "basic insurance agreement" or basic coverage and the limitations on coverage are "exclusion clauses."

Under both Comprehensive policies, basic coverage is for injuries caused by an "occurrence."³⁷ The Commercial policy has two variants. One variant defines coverage by the term "occurrence," while the other variation uses a more restrictive trigger for an insurer's liability.³⁸ The Comprehensive policies define occurrence as "an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured."³⁹ This definition of occurrence is so broad that almost any injury caused while a policy is in effect is presumed covered provided that it is "neither expected nor intended."⁴⁰

³⁴ While each policy successively replaced its predecessor, insurers may still be liable for claims made today under the 1966 and the 1973 policies. See Kahn, *Looking for "Bodily Injury": What Triggers Coverage Under a Standard Comprehensive General Liability Insurance Policy?*, 19 FORUM 532, 539 (1984). Under the Comprehensive policies, insurers sometimes must compensate victims for injuries that manifest themselves years after a policy expires when such injuries can be linked to an insurable event during the policy period. Kunzman, *The Insurer as Surrogate Regulator of the Hazardous Waste Industry: Solution or Perversion?*, 20 FORUM 469, 475 (1985). This type of claim is known as "long-tail" liability. *Id.* See generally Kahn, *supra*, at 538-53. Long-tail liability can make quite difficult the insurer's task of estimating what to charge an insured for a policy.

³⁵ The "coverage" of an insurance contract is the type of liability for which an insurer agrees to pay on behalf of the insured. See 9 COUCH, *supra* note 5, § 39.3.

³⁶ See 1 COUCH, *supra* note 5, § 1.72; Commercial General Liability Coverage Form 1-3 [hereinafter Commercial Coverage Form], included in Explanatory Memorandum, *supra* note 25.

³⁷ Tyler & Wilcox, *supra* note 9, at 498.

³⁸ Explanatory Memorandum, *supra* note 25, at 1. In addition to a form of the Commercial policy that provides coverage for an "occurrence," a second version provides coverage on a "claims made" basis. Under "claims made" policies, coverage does not depend on when the damage occurs. Instead, "claims made" coverage requires the insured party to file its claim with the insurer within a specified period of time for the claim to be covered. See *id.*; Sparrow, *supra* note 3, at 169. "Occurrence" based policies allow filing a claim without any time limit. See *supra* note 34.

³⁹ Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 FORUM 762, 764 (1976).

⁴⁰ See Tyler & Wilcox, *supra* note 9, at 498-99. The issue of whether an occurrence happens upon exposure to a condition, manifestation of an injury, or continuously while being exposed

In all three policies, "exclusion clauses" limit the broad coverage provided by the term "occurrence."⁴¹ Exclusion clauses designate certain events that the policy does not cover.⁴² The reasons underlying exclusions vary. Some events, such as automobile damage, may be covered already by alternate forms of insurance besides general business policies.⁴³ Other events may be denied coverage because the probability that the event will occur is high and the event is therefore too costly to insure. The latter type of event is excluded from coverage because it is more properly treated as the regular cost of doing business than as an insurable loss.⁴⁴

The 1966 Comprehensive policy exposed insurers to unexpected liability for contamination injuries because it contained no clause excluding coverage for pollution damage.⁴⁵ Insurers may have believed pollution injuries were not within the definition of "occurrence" and that an exclusion clause was unnecessary.⁴⁶ While insurers had some experience with policies using the term "occurrence" prior to 1966, most business coverage had been based on the term "accident" rather than the term "occurrence."⁴⁷ "Occurrence" is applicable to a broader range of events than the term "accident."⁴⁸ "Accident" connotes a distinct and unexpected event,⁴⁹ while "occurrence" suggests a less distinct event or stream of events that causes unexpected injury.⁵⁰ Insurers may have believed that occurrence-based policies would not cover oil spills from tankers and offshore platforms, or emissions from industrial processes. However, the *Torrey Canyon* oil spill,⁵¹ the leaks at Santa Barbara,⁵² and court decisions such as *Grand River Lime Co. v. Ohio Casualty Insurance*

is beyond the scope of this article. For a discussion of this issue, see generally Obremski, *supra* note 9, at 11-32.

⁴¹ See R. KEETON, *supra* note 24, § 5.1(b)(1).

⁴² *Id.*

⁴³ Smith, Rodburg & Chesler, *supra* note 30, at 329.

⁴⁴ R. KEETON, *supra* note 24, § 5.3(a).

⁴⁵ See Soderstrom, *supra* note 39, at 765-66; Tyler & Wilcox, *supra* note 9, at 499-500.

⁴⁶ See *Status Report*, *supra* note 8, at 221; Tyler & Wilcox, *supra* note 9, at 499-500.

⁴⁷ Hourihan, *supra* note 30, at 552.

⁴⁸ *Id.*

⁴⁹ Tyler & Wilcox, *supra* note 9, at 499; see Note, *supra* note 11, at 1241-42.

⁵⁰ See Kahn, *supra* note 34, at 534-35; see also Hourihan, *supra* note 30, at 553 ("... suddenness was no longer a condition to coverage. Foreseeability and intent became the new focus for determination of coverage . . .").

⁵¹ The *Torrey Canyon* was an oil tanker that ran aground off the coast of England in 1967. Claims from this oil spill amounted to \$7.8 million. Sparrow, *supra* note 3, at 171.

⁵² In 1969, substantial losses for insurers arose from oil leaks from a drilling platform near Santa Barbara, California. Kunzman, *supra* note 34, at 475.

Co.⁵³ expanded the scope of coverage to include these events. These incidents made apparent the fact that pollution is covered under the 1966 Comprehensive policy provided the insured did not intend the damage.⁵⁴

The insurers tried to limit the broad liability imposed under the 1966 Comprehensive policy by drafting a "mandatory pollution endorsement" in 1970.⁵⁵ A mandatory endorsement is a separate agreement supplementing the policy's coverage terms.⁵⁶ In 1973, the mandatory pollution endorsement was written into the Comprehensive policy as the "pollution exclusion clause."⁵⁷

B. The 1973 Pollution Exclusion Clause

The text of the 1973 pollution exclusion clause stated there was no coverage for:

bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.⁵⁸

The pollution exclusion clause contains two phrases that together limit coverage for certain pollution-related damage. The first phrase identifies contaminating activities for which there is to be no insurance coverage.⁵⁹ This phrase provides that there will be no coverage for "bodily injury or property damage arising out of the discharge,

⁵³ 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972). Grand River emitted pollutants over a seven year period. Even though those emissions were part of an ongoing industrial process, the court found Grand River covered for pollution-related injuries. The court held that if the polluter had no intent to injure a party through its emissions, the damage caused by its pollution was an occurrence. *See id.* at 184-86, 289 N.E.2d at 365-66.

⁵⁴ *See* Tyler & Wilcox, *supra* note 9, at 500 & n.23; Note, *supra* note 1, at 915; *see also* Note, *supra* note 11, at 1251 (insurers' primary concern about the 1966 policy "was that the occurrence-based policies . . . seemed tailor-made to extend coverage to most pollution situations").

⁵⁵ Tyler & Wilcox, *supra* note 9, at 500 & n.24.

⁵⁶ *See* 1 COUCH, *supra* note 5, § 4.32.

⁵⁷ Soderstrom, *supra* note 39, at 768.

⁵⁸ *See, e.g.*, Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33 (1st Cir. 1984); *see also* 1 COUCH, *supra* note 5, § 1.72.

⁵⁹ *See, e.g.*, C.H. Heist Caribe Corp. v. St. Paul Fire & Marine Ins. Co., 640 F.2d 479, 483 (3d Cir. 1981); Molton, Allen & Williams, Inc. v. American Home Assurance Co., 347 So. 2d 95, 99 (Ala. 1977); A-1 Sandblasting & Steamcleaning Co. v. Baiden, 53 Or. App. 890, 895-96, 632 P.2d 1377, 1379-80 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982).

dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; . . . ”⁶⁰ The quoted phrase denies coverage for certain types of discharges or other emissions that cause injury by contamination.⁶¹ For purposes of this Comment these contaminating activities will be said to be the *subject matter* of the pollution exclusion clause.

The ability of the subject matter phrase to limit coverage under the Comprehensive policy is itself limited by the second phrase of the pollution exclusion clause.⁶² The second phrase says that the pollution exclusion clause “does not apply if such discharge, dispersal, release or escape is sudden and accidental.”⁶³ For purposes of this Comment this phrase will be referred to as the “*sudden and accidental*” exception. The “sudden and accidental” exception allows coverage for certain occurrences that otherwise would be “excluded” because they fell within the subject matter of the pollution exclusion clause.⁶⁴

The term “occurrence,” the subject matter phrase of the pollution exclusion clause, and the clause’s “sudden and accidental” exception together define coverage under the Comprehensive policy for contamination-caused injuries.⁶⁵ Recently, in the 1985 Commercial pol-

⁶⁰ See *supra* note 58 and accompanying text.

⁶¹ See *Molton*, 347 So. 2d at 99; *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 89 A.D.2d 401, 403–04, 456 N.Y.S.2d 504, 505–06 (App. Div. 1982); *City of Milwaukee v. Allied Smelting Co.*, 117 Wis. 2d 377, 384–85, 344 N.W.2d 523, 526–27 (Ct. App. 1983). Two cases that are also based on interpreting what is a contamination injury are *Pepper Indus., Inc. v. Home Ins. Co.*, 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977), and *Clement v. Taylor*, 382 So. 2d 231 (La. App. 1980). These cases involved a variant of the pollution exclusion clause, the oil pollution endorsement, which omitted any “exception” language that allowed coverage for “sudden and accidental” contamination.

⁶² See 12 COUCH, *supra* note 5, § 44A:5.

⁶³ See *supra* note 58 and accompanying text.

⁶⁴ See *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 132, 477 N.E.2d 1227, 1233 (1984).

⁶⁵ Other exclusion clauses may be relevant in some cases. For example, some cases considering the pollution exclusion clause also discuss such exclusion clauses as the “completed operations hazard exclusion,” the “intentional acts exclusion,” and the “violation of law exclusion.” See, e.g., *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 227–29 (Me. 1980); *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 567–68, 489 A.2d 1265, 1269–70 (L. Div. 1984), *rev’d on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985). This Comment will not discuss the applicability of these exclusion clauses, except insofar as to note that none of these were determinative in any of the cases discussed.

The question of what constitutes “damages” is also relevant in determining coverage for governmental claims for reimbursement of cleanup or “response” costs under CERCLA. See 42 U.S.C. § 9607 (1982). All courts deciding underlying governmental claims under this section

icy, I.S.O. has rewritten the pollution exclusion clause.⁶⁶ This Comment will discuss the language and effectiveness of the new contract form after reviewing the case law under the 1973 Comprehensive policy,⁶⁷ for such a review may point out interpretational issues courts will face under the new wording. The case law under the Comprehensive policy is in turn influenced by principles of insurance law, specifically the duties of insurers under insurance contracts and the interpretational doctrines that courts use to determine a contract's coverage.

III. THE DUTIES OF INSURERS AND INSURANCE CONTRACT INTERPRETATION PRINCIPLES

The two basic duties of an insurer are the duty to indemnify and the duty to defend. The duty to indemnify is essentially the responsibility of the insurer to pay on behalf of the insured those obligations agreed upon by the two parties in the insurance contract.⁶⁸ In both the Comprehensive and the Commercial policies, this duty applies generally for bodily injury or property damage to third parties caused by an occurrence.⁶⁹ The duty to indemnify arises only upon a determination that the injuries are actually caused by a covered risk.⁷⁰

have denied jury trials, generally holding that such claims are equitable claims for restitution. *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 432 (D. Md. 1986). Insurers argue that such equitable claims are not within the coverage of Comprehensive policies because the claims are not for legal damages or property damage. Two courts have accepted the insurers' arguments. *See Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328-29 (4th Cir. 1986) (alternate holding of two judges); *Armco*, 643 F. Supp. at 435. At least one federal circuit court has rejected this argument directly in the context of CERCLA. *See Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180, 1189 (8th Cir. 1987) (2-1 majority). Other courts allow coverage for the cost of complying with governmental cleanup orders under other statutes. *See United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 589-90, 336 N.W.2d 838, 843 (1983); *Lansco, Inc. v. Department of Env'tl. Protection*, 138 N.J. Super. 275, 282-83, 350 A.2d 520, 524 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977). These courts view the underlying claims to be damages to the state in its quasi-sovereign capacity as guardian of the environment. *See, e.g., Northeastern Pharmaceutical*, 811 F.2d at 1185-89.

⁶⁶ *See infra* notes 259-80 and accompanying text for a discussion of the Commercial policy.

⁶⁷ *See infra* notes 102-258 and accompanying text.

⁶⁸ For a discussion of the principle of indemnity in insurance contracts, *see generally* R. KEETON, *supra* note 24, § 3.1.

⁶⁹ *Tyler & Wilcox*, *supra* note 9, at 498-99; Explanatory Memorandum, *supra* note 25, at 1. A second version of the Commercial policy restricts coverage to claims made during a policy period. *Id.* The effect of this is to eliminate the "long-tail" liability of occurrence based policies. *See supra* note 34.

⁷⁰ 9 COUCH, *supra* note 5, § 39.3.

The duty to defend is broader than the duty to indemnify.⁷¹ While the duty to indemnify is limited to actually covered events, the duty to defend requires that the insurer defend the insured against any complaint that alleges a potentially covered injury.⁷² The insurer must defend the insured against even specious complaints that allege a covered injury, regardless of the probability that the insurer will actually have to pay anyone.⁷³ One reason the duty to defend is broader than the duty to indemnify is to avoid forcing the policyholder to litigate an independent trial of the underlying case in order to find the insurance company liable.⁷⁴

Closely related to the duty to defend is the obligation to settle when given a reasonable offer.⁷⁵ One result of the obligation to settle is that the duty to defend often becomes the major focus of litigation. The question of the duty to indemnify may never be resolved by a court because settlement often disposes of insurance cases.⁷⁶ The obligation to settle that arises out of the duty to defend any potentially covered claim makes insurers vulnerable to several contract interpretation rules that allow many claims to appear potentially covered.⁷⁷

To determine whether an insurer must defend or indemnify an insured, courts rely on general rules of contract interpretation and

⁷¹ *E.g.*, *Reliance Ins. Co. v. Martin*, 126 Ill. App. 3d 94, 97, 467 N.E.2d 287, 289 (1984); *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 653, 477 N.E.2d 146, 151, *review denied*, 395 Mass. 1102, 480 N.E.2d 24 (1985); *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 420, 439 N.Y.S.2d 538, 541 (App. Div.), *mot. for lv. to app. dism.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981).

⁷² See 14 COUCH, *supra* note 5, § 51.42.

⁷³ See *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 226 (Me. 1980) (insured has right to defense "even when the allegations are broad, and uncertain as to specific facts," provided that the allegations state potential liability within the policy's coverage); *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 160, 451 A.2d 990, 992 (L. Div. (1982) (duty to defend "is not excused because the claim cannot be maintained against the insured either in law or in fact"); see also, *Shapiro*, 19 Mass. App. Ct. at 653, 477 N.E.2d at 150-51 (policy in question provided that the insurer had a duty to defend any suit for "property damage, even if any of the allegations of the suit are groundless, false or fraudulent . . .").

⁷⁴ See *Dingwell*, 414 A.2d at 227.

⁷⁵ 14 COUCH, *supra* note 5, § 51.1.

⁷⁶ See *Soderstrom*, *supra* note 39, at 771. Several courts have required insurers to defend purchasers of Comprehensive policies without determining whether the pollution exclusion clause would bar eventual indemnification of the insured's losses. See, e.g., *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479, 483 (3d Cir. 1981); *Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064, 1073, 1076 (D. Idaho 1986); *Reliance Ins. Co. v. Martin*, 126 Ill. App. 3d 94, 98, 467 N.E.2d 287, 290 (1984).

⁷⁷ See *Smith, Rodburg & Chesler*, *supra* note 30, at 332 (" . . . much of insurance case law favorable to insureds has arisen in the context of the insurer's duty to defend.").

construction, as well as doctrines specially applicable to insurance policies. One such principle is that when the provisions of an insurance contract are clear, courts interpret the contract as it is written.⁷⁸ To clarify a policy's meaning, insurers often print specially defined terms in a different typeface or surround them in quotations, and spell out these terms in the policy's definitional section.⁷⁹ Courts attempt to honor all the terms of an insurance contract.⁸⁰

Where a contract's terms are ambiguous, courts favor a reasonable construction that supports coverage.⁸¹ When a court construes ambiguities in favor of coverage it prevents frustration of the basic purpose for purchasing insurance: the indemnification of losses.⁸² Provisions in a contract are ambiguous if particular words are reasonably susceptible to more than one interpretation.⁸³ Courts require those phrases that create exceptions to the basic coverage provisions—"exclusions"—to clearly exclude coverage⁸⁴ in order to prevent the elimination of more coverage than intended by the insured.⁸⁵

Courts will not honor the insurer's intention to limit coverage of certain risks if this intention is ambiguously expressed.⁸⁶ Instead, courts look for both parties' objectively-manifested intent, as implied by the words of the contract.⁸⁷ One principle of contract interpretation that courts will use to imply the parties' intent is that of *ejusdem generis*.⁸⁸ This principle allows a court to infer that specific words restrict the meaning of general terms when the specific terms precede the general terms in a particular phrase.⁸⁹ Thus, in a phrase "cattle, hogs and other animals," "animals" may not refer to much more than farm animals, because the specific animals mentioned before the general word are hogs and cattle.⁹⁰ *Ejusdem generis* is only one aspect of a broader doctrine holding that general phrases

⁷⁸ See 2 COUCH, *supra* note 5, § 15.10.

⁷⁹ See, e.g., 1 COUCH, *supra* note 5, § 1.72; Commercial Coverage Form, *supra* note 36.

⁸⁰ 2 COUCH, *supra* note 5, § 15.29.

⁸¹ *Id.* § 15.74.

⁸² *Id.* § 15.26; Smith, Rodburg & Chesler, *supra* note 30, at 329.

⁸³ C.H. Heist Caribe Corp. v. American Home Assurance Co., 640 F.2d 479, 481 (3d Cir. 1981); cf. Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 161, 451 A.2d 990, 992 (L. Div. 1982) (if the policy's terms permit two interpretations, a court will apply the one that favors the insured).

⁸⁴ 2 COUCH, *supra* note 5, § 15.71.

⁸⁵ See 1 COUCH, *supra* note 5, § 5.2.

⁸⁶ See 2 COUCH, *supra* note 5, § 15.26.

⁸⁷ *Id.* § 15.9.

⁸⁸ *Id.* § 15.69.

⁸⁹ *Id.* § 15.71; E. FARNSWORTH, CONTRACTS § 7.11 (1982).

⁹⁰ E. FARNSWORTH, *supra* note 89, § 7.11.

may be restricted in meaning by being grouped with specific terms regardless of the ordering.⁹¹ Thus, as in the above example, the term "animals" in the phrase "animals, cattle and hogs" may be limited to farm animals under this broader doctrine. In applying construction doctrines, courts look to the ordinary meanings of the words used in a phrase to discern the intent of the parties.⁹²

Closely related to a court's attempt to find the objective intent of the parties is the court's attempt to discern the reasonable expectations of the insured as to coverage.⁹³ Since the insurer drafts and controls the wording of the insurance policy,⁹⁴ the expectations of a reasonably prudent person buying the insurance is given more weight than the expectations of the insurer.⁹⁵ The known character of the insured's business affects the assumed expectations of both parties to the contract.⁹⁶ When a risk is one that a prudent person in the position of the insured would reasonably expect to be covered, an exclusion clause must clearly bar coverage to be effective.⁹⁷

Insurers have the burden of establishing that an exclusion clause clearly denies coverage.⁹⁸ This burden is more difficult to overcome when there is a split in prior judicial interpretations of the same wording.⁹⁹ Also, the burden may be increased or decreased by a consensus in judicial interpretation of the same language favoring either insurers or insureds.¹⁰⁰ A consensus may be a prudential limit on a court's opportunity to reinterpret a standardized contract, because the parties to the contract are presumed to have understood the contract's terms in accordance with the judicial consensus position at the time of making the contract.¹⁰¹

⁹¹ See 2 COUCH, *supra* note 5, § 15.71.

⁹² 2 COUCH, *supra* note 5, §§ 15.17-18.

⁹³ See, e.g., *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 893-94, 632 P.2d 1377, 1378-79 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714-15, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983).

⁹⁴ R. KEETON, *supra* note 24, § 6.3(a).

⁹⁵ See 2 COUCH, *supra* note 5, § 15.84.

⁹⁶ 2 COUCH, *supra* note 5, § 15.26; see *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 489, 426 N.Y.S.2d 603, 605 (App. Div. 1980); *A-1 Sandblasting*, 53 Or. App. at 896, 632 P.2d at 1380.

⁹⁷ 2 COUCH, *supra* note 5, § 15.93. To make what is and what is not covered apparent to the insured, in policies such as the Comprehensive and the Commercial policies, insurance companies place exclusion clauses in the section describing coverage immediately following the basic insurance agreement. R. KEETON, *supra* note 24, § 2.11(d).

⁹⁸ 12 COUCH, *supra* note 5, § 44A.3.

⁹⁹ 2 COUCH, *supra* note 5, § 15.84.

¹⁰⁰ *Id.* § 15.20.

¹⁰¹ *Id.*

Insurers have generally failed to carry the burden of showing that the 1973 Comprehensive policy's pollution exclusion clause clearly denies coverage for many types of pollution. Through analyzing the pollution exclusion clause in light of the duties of insurers and various construction rules, a consensus has emerged favoring insureds under the Comprehensive policy that has made the clause ineffective as a bar to insurer liability.

IV. JUDICIAL CONSENSUS INTERPRETATION OF COVERAGE UNDER THE COMPREHENSIVE POLICY

Fact patterns of cases involving the 1973 Comprehensive policy's pollution exclusion clause and analytical approaches applied by courts reviewing this clause are so similar that there is an effective consensus view among courts that the policy permits coverage for many pollution claims.¹⁰² In the typical scenario presented by cases turning on the applicability of the pollution exclusion clause, an injured party files a complaint against the insured to recover for damage resulting from contamination.¹⁰³ The insured then files a claim with the insurer for defense and indemnification.¹⁰⁴ In these cases, the insurer refuses to defend or indemnify the insured because, in the insurer's view, the pollution exclusion clause barred coverage for the alleged injury. Either the insurer or the insured will then file a separate action on the issue of whether the insurer had a duty to defend or indemnify. The case is then analyzed by a court applying reasoning that falls into common patterns.

This section will consider the analytical approach used by courts in thirteen states to find coverage for contamination-related injuries under Comprehensive policies that contain the pollution exclusion clause.¹⁰⁵ The analysis will focus on two series of decisions that found

¹⁰² Smith, Rodburg & Chesler, *supra* note 30, at 328; *see infra* notes 111-73 and accompanying text.

¹⁰³ *See, e.g.*, Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 31 (1st Cir. 1984); C.H. Heist Caribe Corp. v. American Home Assurance Co., 640 F.2d 479, 480 (3d Cir. 1981); Reliance Ins. Co. v. Martin, 126 Ill. App. 3d 94, 95, 467 N.E.2d 287, 288 (1984).

¹⁰⁴ For a description of claims processing, *see generally* R. KEETON, *supra* note 24, § 7.

¹⁰⁵ Examples include: Alabama: Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co., 347 So. 2d 95 (Ala. 1977); California: Pepper Indus., Inc. v. Home Ins. Co., 67 Cal. App. 3d 1012, 134 Cal. Rptr. 904 (1977); Florida: Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189 (S.D. Fla. 1985); Illinois: *Martin*, 126 Ill. App. 3d at 98, 467 N.E.2d at 290; Louisiana: Clement v. Taylor, 382 So. 2d 231 (La. Ct. App. 1980); Maine: Travelers Indem. Co. v. Dingwell, 414 A.2d 220 (Me. 1980); Massachusetts: Shapiro v. Public Serv. Mut. Ins. Co., 19 Mass. App. Ct. 648, 477 N.E.2d 146, *review denied*, 395 Mass. 1102, 480 N.E.2d

coverage for the insured. The first series found coverage because the pollution exclusion clause's initial phrase, which defines pollution injuries for the purposes of the clause,¹⁰⁶ did not describe the particular contamination injury for which the insured sought coverage.¹⁰⁷ In the second series of opinions, courts interpreted the pollution exclusion clause's exception that permits coverage for sudden and accidental pollution¹⁰⁸ to mean that the pollution injury merely needed to be unexpected and unintended to be covered.¹⁰⁹

A. Subject Matter Limitations

One method for finding coverage for injuries caused by contamination is to limit the subject matter of the pollution exclusion clause.¹¹⁰ By examining the manner and type of emissions listed in the initial phrase of the clause, which describes the scope of potentially uninsurable pollution,¹¹¹ courts imply that the clause applies only to injuries directly caused by industrial contamination of the environment-at-large.¹¹² Courts find that the pollution exclusion clause does not limit coverage when the contamination to be covered is non-industrial,¹¹³ when there is no allegation of environmental pollution,¹¹⁴ and when coverage is reasonably expected by the insured.¹¹⁵ Rather than stating that the particular pollution incident at issue is "sudden and accidental," courts limit an insurer's ability to avoid liability by holding that in these instances the type of injury is not one described by the clause's general language prohibiting

24 (1985); New Jersey: Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 186 N.J. Super. 156, 451 A.2d 990 (L. Div. 1982); New York: Autotronic Sys., Inc. v. Aetna Life & Casualty, 89 A.D.2d 401, 456 N.Y.S.2d 504 (App. Div. 1982); Ohio: Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984); Oregon: A-1 Sandblasting & Steamcleaning Co. v. Baiden, 53 Or. App. 890, 632 P.2d 1377 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982); Washington: United Pac. Ins. Co. v. Van's Westlake Union, Inc., 34 Wash. App. 708, 664 P.2d 1262, *review denied*, 100 Wash. 2d 1018 (1983); *see also* C.H. Heist, 640 F.2d at 483 (applying Virgin Island law).

¹⁰⁶ *See supra* notes 59-61 and accompanying text.

¹⁰⁷ *See infra* notes 111-35 and accompanying text.

¹⁰⁸ *See supra* notes 62-64 and accompanying text.

¹⁰⁹ *See infra* notes 145-73 and accompanying text.

¹¹⁰ *See infra* notes 113-35 and accompanying text.

¹¹¹ *See supra* notes 59-61 and accompanying text.

¹¹² An example of industrial contamination of the environment-at-large would be the stereotypical manufacturer who discharges wastes into a river.

¹¹³ For examples, *see infra* notes 117-23 and accompanying text.

¹¹⁴ For examples, *see infra* notes 124-30 and accompanying text.

¹¹⁵ For examples, *see infra* notes 131-35 and accompanying text.

coverage for pollution-caused injuries.¹¹⁶ The three categories of limitations on the pollution exclusion clause's scope will be discussed in turn.

1. Non-Industrial Contamination Injuries

The first group of decisions holds that contamination injuries caused by non-industrial activities are outside the scope of the subject matter of the pollution exclusion clause because the pollutants and actions identified in the subject matter language all arise from industrial operations.¹¹⁷ Courts have noted that the specific language in the subject matter phrase identifying various industrial-type emissions such as "soot, fumes, acids, alkalis, toxic chemicals . . ." precedes the general language in the pollution exclusion clause concerning "other irritants, contaminants or pollutants."¹¹⁸ From this arrangement of terms, courts imply an intent to limit the breadth of the general language to industrial irritants, contaminants and pollutants.¹¹⁹

Courts have found that the pollution exclusion clause does not eliminate coverage unless the insured is an industrial polluter. For example, the pollution exclusion clause has not barred coverage for non-industrial insureds such as a real estate development company that had sand run from its development site onto adjacent properties.¹²⁰ Similarly, an insurer had to defend an insured county when the injuries the county allegedly caused were due to miscellaneous acts of negligence in safeguarding a waste site. The county did not actually dump chemicals as part of its operations, and therefore was not an industrial polluter.¹²¹ Another court found for an insured

¹¹⁶ See, e.g., *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 89 A.D.2d 401, 404, 456 N.Y.S.2d 504, 506 (App. Div. 1982); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 715, 664 P.2d 1262, 1266, review denied, 100 Wash. 2d 1018 (1983).

¹¹⁷ See *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95 (Ala. 1977); *Autotronic*, 89 A.D.2d at 403, 456 N.Y.S.2d at 505-06; *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div.), *mot. for lv. to app. disp.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981).

¹¹⁸ *Molton*, 347 So. 2d at 98; *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 893-94, 632 P.2d 1377, 1379 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982). For the language of the exclusion, see *supra* note 58 and accompanying text.

¹¹⁹ *Molton*, 347 So. 2d at 99. The basis of implying an intent to limit the language to industrial contaminants is the doctrine of *ejusdem generis*, discussed *supra* notes 88-90 and accompanying text.

¹²⁰ *Molton*, 347 So. 2d at 99-100. The *Molton* court held that sand running off a developer's property onto abutters' land and into a lake did not constitute an irritant within the meaning of the exclusion as drafted. *Id.*

¹²¹ *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div.), *mot. for lv. to app. disp.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981). The

builder of a gas station when it distinguished injuries due to the negligent construction of the facility from injuries caused by the operation of the station.¹²² These holdings limited the class of polluters not insured by a Comprehensive policy containing the pollution exclusion clause to those manufacturers who cause injury by expelling waste into the air and water or onto land as a result of their particular business activities.¹²³

2. Non-Pollution Injuries

The subject matter of the pollution exclusion clause is also limited when the insured is not alleged to have injured other parties by

underlying complaints against the county alleged various acts of negligence in connection with safeguarding the Love Canal hazardous waste site. *Id.* at 420, 439 N.Y.S.2d at 541. No party to the litigation "seriously contended that Niagara County actually dumped any contaminants," so the county was not an actual industrial polluter. *Id.* at 418 n.2, 439 N.Y.S.2d at 540 n.2. Because the appellate court viewed the pollution exclusion clause as applying to actual polluting acts of the insured, *id.* at 418, 439 N.Y.S.2d at 540, the *Niagara* court held that Utica had a clear duty to defend the county in the complaints. *Id.* at 420, 439 N.Y.S.2d at 541-42.

The lower court had granted summary judgment for the county on the issue of the duty to defend. It found that in the absence of allegations that the county directly was involved in the dumping, the pollution may have been "sudden and accidental" from the standpoint of the insured. *Niagara County v. Utica Mut. Ins. Co.*, 103 Misc. 2d 814, 821, 427 N.Y.S.2d 171, 176 (Sup. Ct. 1980), *aff'd*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div.), *mot. for lv. to app. dismiss.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981). In so holding, the *Niagara* court reasoned:

To hold that a municipality should be deprived of a defense by an insurance company in an action premised on pollution wrongdoing, where the strongest allegations only state that the industrial chemical waste dumping took place within the municipality, or that the municipality acquiesced to the dumping, or had notice of the dumping, would lead to the conclusion that no municipality could expect a defense, if named in a suit involving industrial pollution of an area within the municipality.

Id. at 818, 427 N.Y.S.2d at 174. Two of Niagara County's attorneys, Sheldon Hurwitz and Dan D. Kohane, suggest the basis for the appellate decision was that the damage was unexpected and unintended from the county's standpoint. Hurwitz & Kohane, *supra* note 31, at 383. Various courts and commentators view *Niagara* as based on limiting the pollution exclusion clause to industrial, active, or "actual" polluters. See *City of Northglenn v. Chevron U.S.A., Inc.*, 634 F. Supp. 217, 221 (D. Colo. 1986); *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 163, 451 A.2d 990, 993-94 (Law Div. 1982); *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 89 A.D.2d 401, 403, 456 N.Y.S.2d 504, 505 (App. Div. 1982); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983); Hadzi-Antich, *Coverage for Environmental Liabilities Under the Comprehensive General Liability Insurance Policy: How to Walk a Bull Through a China Shop*, 17 CONN. L. REV. 769, 794 (1985); Note, *supra* note 11, at 1268-69.

¹²² *Autotronic*, 89 A.D.2d at 404, 456 N.Y.S.2d at 506 (1982) (builder of a gasoline station is not the day-to-day commercial operator to whom the exclusion applies).

¹²³ See *Molton*, 347 So. 2d at 99; *Autotronic*, 89 A.D.2d at 404, 456 N.Y.S.2d at 506; see also Tyler & Wilcox, *supra* note 9, at 514.

environmental contamination.¹²⁴ The language used in the initial phrase of the pollution exclusion clause eliminates coverage for injuries caused by pollutants emitted "into or upon land, the atmosphere or any watercourse or body of water . . ." ¹²⁵ Implicit in this language is that emissions that do not enter the general environment—the land, water or air at large—are covered.¹²⁶ Thus, toxic fumes¹²⁷ and sandblasting dust¹²⁸ that do not escape the workplace are covered under the Comprehensive policy despite the pollution exclusion clause. In these instances, there is contamination of individuals but no pollution of the environment.

Additionally, some courts have limited the subject matter of the exclusionary clause to contamination injuries.¹²⁹ For example, two courts held injuries from the explosion of discharged petroleum to be covered because these injuries were alleged to be from the blast and not from contamination.¹³⁰ The consistent basis for the decisions in workplace contamination and petroleum explosion cases is that courts find the pollution exclusion clause applicable only when a third party plaintiff alleges an injury directly resulting from the insured's pollution of the land, air or water.

¹²⁴ See *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479, 483 (3d Cir. 1981); *Pepper Indus., Inc. v. Home Ins. Co.*, 67 Cal. App. 3d 1012, 1019, 134 Cal. Rptr. 904, 908 (1977); *Connor v. Farmer*, 382 So. 2d 1069, 1069–70 (La. App.), *cert. denied*, 385 So. 2d 267 (La. 1980); *Clement v. Taylor*, 382 So. 2d 231, 234 (La. App. 1980).

¹²⁵ See *supra* notes 59–61 and accompanying text.

¹²⁶ See *C.H. Heist*, 640 F.2d at 483.

¹²⁷ See *C.H. Heist*, 640 F.2d at 483. Toxic fumes and substances stored in a tank injured a C.H. Heist employee while he was cleaning it. The *C.H. Heist* court noted that the worker's complaint did not allege that there had been a discharge into the air, land or water. The pollution exclusion clause was held inapplicable without an allegation of discharge into the environment. The court noted that even if a discharge could be implied from the terms of the complaint, American had a duty to defend C.H. Heist since some possible discharges would be insured under the policy. *Id.*

¹²⁸ *Connor*, 382 So. 2d at 1069–70 (employer of a worker who developed silicosis over term of employment covered when contamination is not alleged to have entered environment). The *Connor* opinion also stood for the proposition that insurers must cover injuries when the injuries result from both an excluded and a covered cause. *Id.* at 1070. The Louisiana Supreme Court overruled this aspect of *Connor* in *Picou v. Ferrara*, 412 So. 2d 1297, 1300 (La. 1987).

¹²⁹ See *Pepper Indus., Inc. v. Home Ins. Co.*, 67 Cal. App. 3d 1012, 1019, 134 Cal. Rptr. 904, 908 (1977). *Pepper* discharged gasoline into the San Diego sewer system, thereby causing a fire and an explosion. The city sued *Pepper* for the explosion, and *Pepper* in turn sued its insurers. The *Pepper* court found for *Pepper* against the insurer because the city's complaint alleged injury by explosion and not by pollution. *Id.* Cf. *City of Milwaukee v. Allied Smelting Corp.*, 117 Wis. 2d 377, 386, 344 N.W.2d 523, 527 (Ct. App. 1983). *Allied Smelting* discharged acids into the Milwaukee sewers over a period of years, thereby causing corrosion. The *Allied Smelting* court found no coverage for the company since *Allied Smelting* caused the corrosion through contamination. See *id.*

¹³⁰ *Pepper*, 67 Cal. App. 3d at 1019, 134 Cal. Rptr. at 908; *Clement v. Taylor*, 382 So. 2d 231, 234 (La. Ct. App. 1980).

3. Reasonable Expectations of the Parties

In addition to holding that the language setting the pollution exclusion clause's scope does not eliminate coverage for non-industrial pollution and non-environmental contamination, courts attempt to honor the perceived expectations and intent of the parties when determining the scope of the policy's coverage.¹³¹ Courts weigh various factors when they try to discern the reasonable expectations of the parties. For example, courts look to the nature of the insured's business as one factor that shapes the parties' reasonable expectations concerning coverage.¹³² Thus, parties to a Comprehensive policy issued to a bridge spraypainting company would reasonably expect that the policy would cover overspray damage to passersby.¹³³ Courts also consider the type of property that the insurer agreed to insure. For example, when an insurer agrees to cover injuries caused by a gasoline tank, the insurer cannot maintain that the pollution exclusion clause bars coverage of damage caused by leaks from the tank.¹³⁴ Finally, courts favor coverage when it appears that the policy's language or the insurer's actions fostered a belief that the insured was covered.¹³⁵

Should the insured's activity not be within the subject matter of the pollution exclusion clause, either by being non-industrial pollu-

¹³¹ See *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 419-20, 439 N.Y.S.2d 538, 541 (App. Div.), *mot. for lv. to app. dism.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 489, 426 N.Y.S.2d 603, 605 (App. Div. 1980); *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 894, 632 P.2d 1377, 1379 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982); see also *supra* notes 93-97 and accompanying text.

¹³² See *A-1 Sandblasting*, 53 Or. App. at 896, 632 P.2d at 1380. A-1 contended it had applied for and had obtained insurance for overspray damage to passing vehicles that were splattered while A-1 cleaned and painted a bridge. It maintained that the insurer was familiar with the nature of A-1's spraypainting operation and intended to cover it. The insurers argued they were not liable as a matter of law under the exclusion. The *A-1 Sandblasting* court held that the intent of both parties to the insurance contract was a question of fact and that the pollution exclusion could not be interpreted to preclude as a matter of law coverage for overspray damage.

¹³³ See *id.* at 896, 632 P.2d at 1380. On further appeal of *A-1 Sandblasting*, the Supreme Court of Oregon held that the overspray damage was not so highly foreseeable as to constitute an uninsurable cost of doing business. 293 Or. at 26, 643 P.2d at 1265.

¹³⁴ See *Klock Oil*, 73 A.D.2d at 489, 426 N.Y.S.2d at 605.

¹³⁵ *Id.*; see *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714-15, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983) (terms of contract imply objective intent of insurer to cover third party claims for lost use of property arising out of gasoline leak); see also 1 COUCH *supra* note 5, § 5.2 ("property which would reasonably be included in the [term "occurrence"] is covered, and if the insurers intend otherwise, it should be excluded by proper terms"); cf. *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 6, 487 A.2d 820, 823 (1984) (no coverage when insurer warns insured in advance of occurrence that a specific injury may be expected to arise from an industrial process).

tion,¹³⁶ non-environmental contamination,¹³⁷ or by being reasonably expected to be covered,¹³⁸ then arguably it is not necessary to determine if the contamination would otherwise be excepted from the clause.¹³⁹ If the pollution exclusion clause's subject matter phrase¹⁴⁰ does not unambiguously declare the contamination activity excluded, then under ordinary insurance contract interpretational rules courts should construe the ambiguity in favor of the insured.¹⁴¹ This principle of interpretation alone has been sufficient to support the claim for coverage under the 1973 Comprehensive policy.¹⁴²

Some courts, however, also attempt to interpret the exception to the pollution exclusion clause—the “sudden and accidental” exception—in addition to interpreting the language in the pollution exclusion clause.¹⁴³ Even more courts omit discussion of the scope of the pollution exclusion clause entirely without any explanation.¹⁴⁴ The cases discussing the “sudden and accidental” exception have severely limited the pollution exclusion clause by expanding what is considered “sudden and accidental.”

B. Expanding the “Sudden and Accidental” Exception

The terms “sudden” and “accidental” are not defined in the Comprehensive policy and therefore must be given content by the

¹³⁶ See *supra* notes 117–23 and accompanying text.

¹³⁷ See *supra* note 124–30 and accompanying text.

¹³⁸ See *supra* note 131–35 and accompanying text.

¹³⁹ See *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479, 483 (3d Cir. 1981); *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95, 99–100 (Ala. 1977); *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 89 A.D.2d 401, 404, 456 N.Y.S.2d 504, 506 (App. Div. 1982); *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 897 n.2, 632 P.2d 1377, 1381 n.2 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982); *Van's Westlake*, 34 Wash. App. at 715, 664 P.2d at 1266; see also *Pepper Indus., Inc. v. Home Ins. Co.*, 67 Cal. App. 3d 1012, 1015–16, 134 Cal. Rptr. 904, 906 (1977); *Clement v. Taylor*, 382 So. 2d 231, 234 (La. App. 1980). *Pepper* and *Clement* are especially significant since the policies at issue contained an oil pollution endorsement that entirely omitted the “sudden and accidental” exception.

¹⁴⁰ See *supra* notes 59–61 and accompanying text.

¹⁴¹ See *supra* notes 81–85 and accompanying text.

¹⁴² See *supra* notes 110–35 and accompanying text.

¹⁴³ See *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488, 426 N.Y.S.2d 603, 604–05 (App. Div. 1980); *Niagara County v. Utica Mut. Ins. Co.*, 103 Misc. 2d 814, 821, 427 N.Y.S.2d 171, 176 (Sup. Ct. 1980), *aff'd*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (App. Div.), *mot. for lv. to app. dismissed*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981).

¹⁴⁴ See, e.g., *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33–34 (1st Cir. 1984); *Reliance Ins. Co. v. Martin*, 126 Ill. App. 3d 94, 96–98, 467 N.E.2d 287, 289–90 (1984); *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 651–53, 477 N.E.2d 146, 149–50, *review denied*, 395 Mass. 1102, 480 N.E.2d 24 (1985).

courts.¹⁴⁵ Most courts consider the phrase to mean unexpected, unintended and unforeseen. Consider the phrase to mean unexpected, unintended and unforeseen.¹⁴⁶ Thus, certain situations which may not be sudden and accidental at first glance are interpreted as such, and are consequently insured.

Courts interpret the phrase "sudden and accidental" to describe pollution damage that results from the intervention of forces outside the insured's direct control.¹⁴⁷ In *Lansco, Inc. v. Department of Environmental Protection*,¹⁴⁸ for example, the court held that when vandals use an insured's property to cause damage to others, they are one such intervening force.¹⁴⁹ Similarly, with regard to a waste generating chemical company, a waste hauler may be an intervening force should the hauler dump the generator's refuse in a manner that the generator neither expected nor intended.¹⁵⁰ The resulting

¹⁴⁵ See *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 132, 477 N.E.2d 1227, 1234 (1984). The *Buckeye* court found for the insured because the court interpreted "sudden" and "accidental" as meaning unexpected and unintended. *Id.* at 134, 477 N.E.2d at 1235.

¹⁴⁶ See, e.g., *Lansco, Inc. v. Department of Env'tl. Protection*, 138 N.J. Super. 275, 282, 350 A.2d 520, 524 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977); *Klock Oil*, 73 A.D.2d at 488-89, 426 N.Y.S.2d at 605.

¹⁴⁷ See *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 477 N.E.2d 146, *review denied*, 395 Mass. 1102, 480 N.E.2d 24 (1985); *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 489 A.2d 1265 (L. Div. 1984), *rev'd per curiam on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985); *Lansco*, 138 N.J. Super. at 81, 350 A.2d at 523; *Liberty Solvents*, 17 Ohio App. 3d at 134, 477 N.E.2d at 1235.

¹⁴⁸ 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *cert. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

¹⁴⁹ Vandals spilled oil from Lansco's tanks into the Hackensack River, and when the state asked Lansco to pay for the cleanup, Lansco sued its insurers for coverage. *Lansco*, 138 N.J. Super. at 277-79, 350 A.2d at 521-22. The *Lansco* court held that "since the oil spill was neither expected nor intended by Lansco, it follows that the spill was sudden and accidental under the exclusion clause even if caused by the deliberate act of a third party." *Id.* at 282, 350 A.2d at 524.

¹⁵⁰ See *CPS Chem.*, 199 N.J. Super. at 568-69, 489 A.2d at 1270-71. According to the New Jersey lower court's opinion, CPS Chemical, a New Jersey manufacturer, hired a hauler who illegally and without CPS's knowledge dumped CPS's waste at a Philadelphia waste site. Philadelphia sued CPS Chemical under various common-law liability theories and under CERCLA for response costs. See *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982). The New Jersey lower court understood that in Philadelphia's suit, CPS Chemical was not alleged to have expected or intended the hauling company to illegally dump the wastes and damage property. *CPS Chem.*, 199 N.J. Super. at 563, 489 A.2d at 1268. The state lower court granted summary judgment for CPS Chemical on the issue of duty to defend. *Id.* at 569, 489 A.2d at 1271.

At the summary judgment hearing before the state lower court, counsel for CPS Chemical represented that Philadelphia was dropping all intentional tort theories against generators in the federal court suit. *CPS Chem. Co. v. Continental Ins. Co.*, 203 N.J. Super. 15, 18-19, 495 A.2d 886, 887 (App. Div. 1985), *rev'd per curiam*, 199 N.J. Super. 558, 489 A.2d 1265 (L. Div.

contamination would be sudden¹⁵¹ and accidental¹⁵² from the generator's standpoint. Natural corrosion¹⁵³ is another event that courts have held to be an intervening force, even though the damage corrosion causes—for instance, slow leaks from underground tanks—hardly seems sudden.¹⁵⁴ When an insured takes reasonable steps to detect and prevent natural corrosion, but the insured's property nevertheless corrodes, the corrosion intervenes to cause discharges in an unexpected and unintended manner. Courts have viewed unexpected and unintended discharges to be sudden and accidental.¹⁵⁵

Some courts go so far as to say that unintended injuries resulting from the insured's intentional acts are also sudden and accidental because these injuries are unexpected and unintended from the standpoint of the insured. For example, in *Reliance Insurance Co. v. Martin*,¹⁵⁶ condominium owners sued the operators of an adjacent parking garage for property damage caused by soot and exhaust.¹⁵⁷

1984). One year after the hearing, the insurer discovered that Philadelphia had not dropped the intentional tort theories from its underlying suit. *Id.* at 19, 495 A.2d at 888. As a result of this information, the New Jersey appellate court reversed per curiam the lower court's granting of summary judgment. *Id.* at 20, 495 A.2d at 889. The appellate court held that the confusion over the pleadings in the underlying case precluded forcing the insurer to defend CPS Chemical. *Id.* The appellate court specifically refused to express any opinion on the lower court's analysis of the pollution exclusion clause. *Id.* at 21, 495 A.2d at 889.

¹⁵¹ The lower court viewed "sudden" to mean "unforeseen, unexpected [and] unprepared for." *CPS Chemical*, 199 N.J. Super. at 569, 489 A.2d at 1270.

¹⁵² The court found that to satisfy the "accidental" aspect of the pollution exclusion clause, the insured need show only that the party damaged by the pollution alleged that a person engaged by the insured performed acts that were not expected nor foreseen by the insured. *See id.* at 564, 489 A.2d at 1268.

¹⁵³ *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 650, 477 N.E.2d 146, 149, *review denied*, 395 Mass. 1102, 480 N.E.2d 24 (1985). Oil leaked from a corroded underground tank at an apartment house into an adjacent waterway. The leak was not foreseeable since the insured had had the tank professionally inspected five months before the escape of oil. *Id.* at 652 n.3, 477 N.E.2d at 150 n.3.

¹⁵⁴ Since the insured did not know of the corrosion, the *Shapiro* court viewed the escape of oil to be unexpected, unintended and not designed, and therefore "sudden and accidental" within the meaning of the pollution exclusion clause. *Id.* at 652-53, 477 N.E. at 150.

¹⁵⁵ *See Payne v. United States Fidelity & Guar. Co.*, 625 F. Supp. 1189, 1192-93 (S.D. Fla. 1985); *Evans v. Aetna Casualty & Surety Co.*, 107 Misc. 2d 710, 713, 435 N.Y.S.2d 933, 935 (Sup. Ct. 1981); *cf. Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 134, 477 N.E.2d 1227, 1235 (1984) (both the discharges and the property damage were unexpected and unintended, and therefore could be found sudden and accidental); *Transamerica Ins. Co. v. Sunnes*, 77 Or. App. 136, 141, 711 P.2d 212, 214 (1985), *review denied*, 301 Or. 76, 717 P.2d 631 (1986) (intentional discharges not sudden and accidental).

¹⁵⁶ 126 Ill. App. 3d 94, 467 N.E.2d 287 (1984).

¹⁵⁷ *Id.* at 95, 467 N.E.2d at 288. The suit alleged this damage occurred over a period of time. *Id.* For a discussion of whether damage occurring over a period of time can be sudden and accidental, see *infra* notes 185-222 and accompanying text.

The insurer, Reliance, refused to defend the operators.¹⁵⁸ Reliance obtained a declaratory judgment that held that the pollution exclusion clause eliminated Reliance's liability on the policy.¹⁵⁹ On appeal, the court found the damages covered because "[a]lthough, clearly, the operator of a parking garage must expect to release fumes into the facility itself, as well as into the air and streets, it is not equally clear that he should expect to release soot and fumes into adjacent residential structures."¹⁶⁰ While the act of releasing soot and fumes into the air was expected and intended, the insured may not have expected or intended the exhaust to flow into the adjacent dwelling.¹⁶¹ Therefore, the sudden and accidental exception was not necessarily inapplicable.¹⁶² Similar reasoning has been applied in a case involving inadvertent drift of insecticide spray from one property to another.¹⁶³ In these and other cases,¹⁶⁴ the fact that the insured acted intentionally in doing the thing that caused damage is not decisive the resulting damage must in itself have been intended, expected or foreseen by the insured in order for the insurer to avoid coverage.¹⁶⁵

When courts interpret "sudden and accidental" discharges to mean "unexpected and unintended" injuries, the pollution exclusion clause

¹⁵⁸ *Martin*, 126 Ill. App. 3d at 95-96, 467 N.E.2d at 288.

¹⁵⁹ *Id.* at 96, 467 N.E.2d at 288-89.

¹⁶⁰ *Id.* at 98, 467 N.E.2d at 290.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Farm Family Mut. Ins. Co. v. Bagley*, 64 A.D.2d 1014, 409 N.Y.S.2d 294 (1978). In *Bagley*, the insurer attempted to deny coverage when chemicals sprayed by the insured on an oat farm spread to contaminate an adjacent vineyard. Noting that the defendants alleged that they exercised due care in spraying, the *Bagley* court held for the insured because "clearly, defendants did not intend to disperse the spray so as to cause damage to [the adjacent farmer] Bodine's grapes." *Id.* at 1014, 409 N.Y.S.2d at 296. The court found that while the discharge of the chemicals was an intentional act, the dispersal of the toxins onto the vineyard may have been sudden and accidental.

¹⁶⁴ See *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990 (L. Div. 1982); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488-89, 426 N.Y.S.2d 603, 605 (App. Div. 1980) (dicta).

¹⁶⁵ See *Jackson Township*, 186 N.J. Super. at 165, 451 A.2d at 994. The Authority had continuously deposited wastes in a landfill. *Id.* at 159, 451 A.2d at 991. Residents charged the Authority and other defendants with negligently permitting the wastes to contaminate local groundwater. *Id.* The *Jackson Township* court held that the insurer had a duty to defend the Authority even though the contamination was gradual and continuous. *Id.* at 165, 451 A.2d at 994. So long as the damage was unexpected and unintended from the standpoint of the insured, the *Jackson Township* court found the damage to be sudden and accidental. *Id.* at 164, 451 A.2d at 994. It viewed the continuous and intentional nature of the dumping to be irrelevant when interpreting the "sudden and accidental" exception of the pollution exclusion clause. See *id.*

becomes a mere restatement of the term "occurrence."¹⁶⁶ Such an interpretation results in the clause not excluding any events that meet the definition of occurrence. Courts see the words "an accident . . . which results . . . in bodily injury or property damage neither expected nor intended . . ." in the definition of "occurrence" and the term "accidental" in the pollution exclusion clause, and interpret both "occurrence" and the exclusion as referring to the type of injury.¹⁶⁷ While the term "occurrence" refers to an unexpected and unintended injury, the phrase "discharge, dispersal, release or escape is sudden and accidental" plainly refers to the manner of discharge. Thus, even though the phrase "sudden and accidental" can be equated with "unexpected and unintended," the "sudden and accidental" exception can be viewed as allowing coverage for unexpected and unintended discharges and not unexpected and unintended injuries.¹⁶⁸ Such a construction would allow the pollution exclusion clause to have meaning without frustrating the broad grant of coverage in the basic insurance agreement.

The many possible meanings of the words "sudden and accidental" make unclear the precise intent of the parties to Comprehensive policy contracts. Insurance companies probably believed that the choice of the terms "sudden and accidental" in the pollution exclusion

¹⁶⁶ See 3 R. LONG, *THE LAW OF LIABILITY INSURANCE*, app. 58 (1987). Discussing the pollution exclusion, Long notes:

It eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by definition of "occurrence." Coverage is afforded for damages caused by pollution or contamination if the discharge, dispersal, release, or escape is sudden and accidental.

Id. Courts citing Long for the proposition that the exclusion is merely a restatement of "occurrence" or citing cases that cite Long for this proposition include: *American States Ins. Co. v. Maryland Casualty Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984); *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 569, 489 A.2d 1265, 1270 (L. Div. 1984), *rev'd on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985); *Jackson Township*, 186 N.J. Super. at 162-64, 451 A.2d at 993-94; *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 133, 477 N.E.2d 1227, 1234 (1984); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983); *see also* Hurwitz & Kohane, *supra* note 31, at 379. Courts that cite this passage from Long for the proposition that the exclusion only applies to "actual polluters" include: *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95, 98-99 (Ala. 1977); *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 418, 439 N.Y.S.2d 538, 540 (App. Div.), *mot. for lv. to app. dismiss.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981).

¹⁶⁷ See, e.g., *Jackson Township*, 186 N.J. Super. at 164, 489 A.2d at 994; *Klock Oil*, 73 A.D.2d at 488-89, 426 N.Y.S.2d at 605.

¹⁶⁸ Compare *Payne v. United States Fidelity & Guar. Co.*, 625 F. Supp. 1189, 1193 (S.D. Fla. 1985) (coverage granted because insured did not expect nor intend discharge) with *Transamerica Ins. Co. v. Sunnes*, 77 Or. App. 136, 141, 711 P.2d 212, 214 (1985), *review denied*, 301 Or. 76, 717 P.2d 631 (1986) (coverage denied because insured intended discharge).

clause meant something like an instantaneous failure of facilities or procedures.¹⁶⁹ Despite the insurers' intent to have the pollution exclusion clause restrict the meaning of the term "occurrence," the clause's "sudden and accidental" exception negates much of the exclusion's restriction of "occurrence;" the "sudden and accidental" exception is an ambiguous exception that, under ordinary insurance law practices, courts construe strictly against the insurer.¹⁷⁰ The Comprehensive policy is an industry-wide document, not a contract form carefully tailored to the situation of the individual policyholder. It is therefore not surprising that ambiguities arise from the failure of the standardized policy to match insureds' situations.¹⁷¹ Given the many possible interpretations of the words "sudden" and "accidental,"¹⁷² courts display reluctance to frustrate an insured's reasonable expectations of coverage.¹⁷³

Since the "sudden and accidental" exception has been expanded to allow coverage for almost any occurrence, it is not surprising that this exception has been the focus of more comment¹⁷⁴ than the subject

¹⁶⁹ See *CPS Chem.*, 199 N.J. Super. at 569, 489 A.2d at 1270-71. Several commentators suggest that the pollution exclusion clause was drafted to limit occurrence-based liability for insurers in the growing number of environmental suits of the late 1960's. See, e.g., Hourihan, *supra* note 30, at 553; Soderstrom, *supra* note 39, at 766; Tyler & Wilcox, *supra* note 9, at 500. The *Torrey Canyon* disaster, the Santa Barbara oil spills, and the *Grand River Lime* case are some of the events cited as prompting the pollution exclusion clause. See *supra* notes 45-54 and accompanying text. Thus, one insurance executive believed that with the addition of the pollution exclusion, the Comprehensive policy would still cover accidental discharges, "the sort of thing that can occur when equipment breaks down . . . [but not a] company which knowingly dumps its wastes . . . [because] such repeated actions . . . are not insurable exposures." C. Cox, Liability Insurance in the Era of the Consumer, a speech before the Annual Conference of the American Society of Insurance Management, in Bal Harbour, Fla. (April 9, 1970), quoted in Soderstrom, *supra* note 39, at 767.

Several authorities dispute whether the insurance industry actually intended to clearly declare that there would be no coverage for noninstantaneous pollution. See, e.g., Liability Coverage Standards, *supra* note 3, at 33,904 (at the time I.S.O. drafted the pollution exclusion clause, some insurers argued that the exclusion only served to confuse the definition of occurrence; thus the exclusion's ambiguity may be intentional); Smith, Rodburg & Chesler, *supra* note 30, at 349 ("choice of the terms 'sudden and accidental' appears almost as a calculated effort to assure ambiguity").

¹⁷⁰ See, e.g., *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 651, 477 N.E.2d 146, 149, review denied, 395 Mass. 1102, 480 N.E.2d 24 (1985); *CPS Chem.*, 199 N.J. Super. at 569, 489 A.2d at 1271; *Van's Westlake*, 34 Wash. App. at 712, 664 P.2d at 1265; see also 2 COUCH, *supra* note 5, § 15.74.

¹⁷¹ See Obremski, *supra* note 9, at 33.

¹⁷² See *supra* notes 145-65 and accompanying text.

¹⁷³ See *Jackson Township Mun. Utils Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 161, 451 A.2d 990, 992 (L. Div. 1982).

¹⁷⁴ Hadzi-Antich, *supra* note 121, at 790-95; Hurwitz & Kohane, *supra* note 31, at 381-84; Last, *supra* note 3, at 10,254; Sparrow, *supra* note 3, at 171; Tyler & Wilcox, *supra* note 9, at 507-14.

matter phrase of the pollution exclusion clause.¹⁷⁵ Focusing on the "sudden and accidental" exception may obscure analysis of the issues involved in considering whether a contamination injury is covered under a Comprehensive policy.¹⁷⁶ This section already has noted how some courts interpret the exception for sudden and accidental discharges as referring to the type of injury instead of the manner of discharge.¹⁷⁷ The next section will discuss additional difficulties some courts have with interpreting the "sudden and accidental" exception and will conclude that these difficulties arise from these courts' failure to consider the Comprehensive policy as a whole.¹⁷⁸

V. DIFFICULTIES IN INTERPRETING THE POLLUTION EXCLUSION CLAUSE

The "sudden and accidental" language¹⁷⁹ produces the few issues on which courts differ on the extent of the insured's coverage.¹⁸⁰ Three questions recur: whether continuous releases over a period of time may be sudden and accidental within the meaning of the policy,¹⁸¹ whether the pleadings of the party injured by the insured must specifically allege that the contamination activity was sudden and accidental in order for the insured to be covered,¹⁸² and whether a court may infer that the insured should be denied coverage due to the foreseeability of the contamination-caused damage.¹⁸³ Each of these issues will be addressed in turn. Certain courts have had problems in interpreting the pollution exclusion clause because they have placed too great an emphasis on the interpretation of the "sudden and accidental" exception and too little emphasis on interpreting the term "occurrence" and the subject matter phrase.¹⁸⁴

A. *Insurability of Gradual Contamination*

Gradual or continuous contamination may occur in a number of ways. For example, continuous contamination may occur when a

¹⁷⁵ See *supra* notes 59-61 and accompanying text.

¹⁷⁶ See *infra* notes 179-247 and accompanying text.

¹⁷⁷ See *supra* notes 156-68 and accompanying text.

¹⁷⁸ See *infra* notes 179-258 and accompanying text.

¹⁷⁹ See *supra* notes 62-64 and accompanying text.

¹⁸⁰ See *supra* notes 110-65 and accompanying text for the issues on which there appears to be a consensus.

¹⁸¹ See *infra* notes 185-222 and accompanying text.

¹⁸² See *infra* notes 223-37 and accompanying text.

¹⁸³ See *infra* notes 238-47 and accompanying text.

¹⁸⁴ See *infra* notes 185-237 and accompanying text.

business in the course of its operations intentionally and regularly discharges its waste into a river. The resulting contamination would be intentional. At the other extreme, continuous contamination may also occur when a container that is reasonably thought to be sound develops a slow leak that cannot be detected for months. Such a leak may not even be negligent.

The basic coverage term "occurrence"¹⁸⁵ and both phrases in the pollution exclusion clause's two phrases—the "subject matter" phrase and the "sudden and accidental" exception¹⁸⁶—together define coverage for all types of pollution-related injuries, including those injuries caused by gradual or continuous contamination. When a court focuses its analysis almost exclusively upon interpreting the "sudden and accidental" exception, it may ignore reasonable constructions of the phrase that give meaning to the exception and preserve coverage for types of gradual pollution. For example, a court might overlook construing "sudden and accidental" to mean "unexpected and unintended" even though "unexpected and unintended" is a reasonable interpretation consistent with "occurrence."¹⁸⁷ When a court looks at the phrase "sudden and accidental" out of context, it might not recognize that "sudden and accidental" need not mean an instantaneous happening unassociated with any act of human will.¹⁸⁸ By overemphasizing the "sudden and accidental" exception, some courts have improperly narrowed the scope of the exception, thus improperly narrowing the extent of insurance coverage.¹⁸⁹ A broader, more systematic approach that takes into consideration elements of the whole contract—the basic coverage, the scope of the pollution exclusion clause, and the exception to the clause—consistently with principles of insurance contract construction would permit the Comprehensive policy to cover some types of injuries that relate to gradual pollution.

Courts that disallow coverage for continuous contamination activity reason that what they characterize as the common usage of the terms "sudden and accidental" controls interpretation of the excep-

¹⁸⁵ See *supra* notes 37–40 and accompanying text.

¹⁸⁶ See *supra* notes 58–64 and accompanying text.

¹⁸⁷ See *supra* notes 37–40 and accompanying text.

¹⁸⁸ See *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 569, 489 A.2d 1265, 1270–71 (L. Div. 1984), *rev'd on other grounds*, 203 N.J. Super. 15, 295 A.2d 886 (App. Div. 1985) (if insurers intended "sudden and accidental" to mean an immediate, short-term, dramatic catastrophe, they failed to express this meaning unambiguously).

¹⁸⁹ See *infra* notes 190–203 and accompanying text.

tion.¹⁹⁰ The appellate court in *Techalloy Co. v. Reliance Insurance Co.* determined that the meaning of "sudden and accidental" was so unambiguous that it could rule on the question without giving the insured an opportunity to brief the issue on remand.¹⁹¹ Reliance had refused to defend Techalloy in the underlying suit, which alleged that Techalloy had contaminated the area well water over a twenty-five year period by recklessly dumping and storing trichloroethylene.¹⁹² The *Techalloy* court found that "it is immediately apparent that [the underlying complainant] did not allege a sudden event" because the complaint alleged pollution over twenty-five years.¹⁹³ This and other courts equate "sudden and accidental" with instantaneous, regardless of the insured's intent to discharge contaminants.¹⁹⁴

Sometimes courts focus so exclusively on the terms "sudden and accidental" that they interpret the phrase "sudden and accidental" as being part of the definition of occurrence, even though the contract

¹⁹⁰ See, e.g., *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984); *American States Ins. Co. v. Maryland Casualty Co.*, 587 F. Supp. 1549 (E.D. Mich. 1984); *City of Milwaukee v. Allied Smelting Corp.*, 117 Wis. 2d 377, 344 N.W.2d 523 (Ct. App. 1983).

¹⁹¹ See *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 12-15, 487 A.2d 820, 826-28 (1984). The pollution exclusion clause was not thoroughly briefed on appeal because the lower court had denied coverage on another basis and did not address the pollution exclusion clause. See *id.* at 6, 487 A.2d at 823. The lower court had withheld coverage because it found no covered bodily injury. *Id.* Techalloy addressed the pollution exclusion clause in a footnote to its brief on appeal. *Id.* at 12, 487 A.2d at 826. The appellate court reversed the finding of no bodily injury, but then affirmed the lower court opinion on the basis of the pollution exclusion clause. *Id.* at 11, 15, 487 A.2d at 826-27. The appellate court found that, even though the issue of the pollution exclusion clause had not been discussed in Techalloy's brief, it could infer from the facts that the groundwater contamination was not sudden and accidental. *Id.* at 13, 487 A.2d at 826. The court noted, "Techalloy would have us judicially interpret a provision whose meaning here is unequivocal. Further, Techalloy offers no alternative interpretation of 'sudden and accidental' which would render it ambiguous and capable of our interpretation." *Id.* at 14-15, 487 A.2d at 827. In its footnote briefing the pollution exclusion clause, appellant Techalloy relied on *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479 (3d Cir. 1981), as authority for interpreting the "sudden and accidental" exception. *Techalloy*, 338 Pa. Super. at 12-13, 487 A.2d at 826. The *C.H. Heist* court did not analyze whether the "sudden and accidental" exception applied to that case because it based its holding on the subject matter phrase of the pollution exclusion clause. See *C.H. Heist*, 640 F.2d at 483 (duty to defend when the underlying complaint does not allege environmental contamination); see *supra* notes 124-30 and accompanying text.

¹⁹² *Techalloy*, 338 Pa. Super. at 5, 14, 487 A.2d at 822, 827.

¹⁹³ *Id.* at 13, 487 A.2d at 827.

¹⁹⁴ See *Great Lakes*, 727 F.2d at 33-34; *American States*, 587 F. Supp. at 1553; *Allied Smelting*, 117 Wis. 2d at 385-86, 344 N.W.2d at 527.

does not define occurrence in terms of "sudden and accidental."¹⁹⁵ In *American States Insurance Co. v. Maryland Casualty Co.*, for instance, the court stated that continuous releases of contaminants in its case were "not in any way sudden or accidental, and therefore do not even arguably state an occurrence."¹⁹⁶ The court reached this conclusion even though the words "sudden and accidental" are part of the pollution exclusion clause and do not appear in the definition of "occurrence."¹⁹⁷ Furthermore, the court glossed over the fact that two of the policies in question defined "occurrence" to include continuous exposure to conditions and also the fact that the key policy in question during the period of dumping did not contain a pollution exclusion clause.¹⁹⁸ An additional sign of the *American States* court's confusion over the significance of the term "occurrence" is the court's reliance on persuasive precedent regarding accident-based coverage¹⁹⁹ for pollution²⁰⁰ when it

¹⁹⁵ See *American States*, 587 F. Supp. at 1553-54; see also *Great Lakes*, 727 F.2d at 33-34.

¹⁹⁶ 587 F. Supp. 1549, 1553-54 (E.D. Mich. 1984). *American States* and four other insurers issued Comprehensive policies covering National Drum and Barrel Corp. between July, 1966 and October, 1982. In a series of private suits, plaintiffs alleged that National Drum produced toxic wastes that unidentified parties dumped at Detroit area sites during the period these policies were effective. The underlying plaintiffs turned to suing National Drum only after the owners of the dump site had refused to clean it up despite orders dating back to the early 1970's. *Id.* at 1550-51.

American States began to defend National Drum, advancing less than \$65,000 in defense and settlement costs. American States then attempted to bind the other insurers to defending National Drum. *Id.* The *American States* court found that none of the insurers, including American States, had a duty to defend National Drum. The court held that there was no occurrence because the release of the wastes was not sudden and accidental in the sense the phrase was used in the Comprehensive policies. *Id.* at 1553-54.

¹⁹⁷ *Id.* at 1552; see also *supra* notes 37-40 and accompanying text (standard Comprehensive policy definition of occurrence).

¹⁹⁸ *American States*, 587 F. Supp. at 1552. The pollution exclusion clause and its "sudden and accidental" language do not appear in any policy until after October, 1970. *Id.* The court even noted that National Drum used the sites only between 1968 and 1970, *id.* at 1553, but still managed to read a "sudden and accidental" requirement into the definition of occurrence in the pre-1970 policies.

¹⁹⁹ See *supra* notes 45-54 and accompanying text for a comparison of accident-based policies and occurrence-based policies.

²⁰⁰ 587 F. Supp. at 1552. The court looked at the definition of accident in Black's Law Dictionary. *Id.*

[A] fortuitous circumstance, event, or happening; an event happening without any human agency, or if happening wholly or partly through human agency an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event; chance or contingency; fortune; mishap; some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops; some-

was reviewing claims for coverage under occurrence-based²⁰¹ Comprehensive policies.

The cited cases did not clarify the term "occurrence" because most authorities recognize that occurrence-based policies cover more events than accident-based policies.²⁰² The *American States* court is silent on the issue of whether the insured expected or intended the operator of the waste sites in question to release the insured's waste. *American States* and other decisions denying coverage for gradual pollution do not emphasize that the contaminant discharges were foreseeable or expected—instead these decisions emphasize that the continuous nature of the contamination is decisive by itself.²⁰³

thing happening by chance; something unforeseen, unexpected, unusual, extraordinary or phenomenal, taking place not according to the usual course of things or events, out of the range of ordinary calculations; that which exists or occurs abnormally, or an uncommon occurrence.

Id. (citing BLACK'S LAW DICTIONARY 14 (5th ed. 1979)). The *American States* court also cited three cases that held that the release of contaminants in the course of business is not an insurable accident. *Id.* (citing *American Casualty Co. v. Minnesota Farm Bureau Servs. Co.*, 270 F.2d 686 (8th Cir. 1959); *United States Fidelity & Guar. Co. v. Briscoe*, 205 Okla. 618, 239 P.2d 754 (1951); *Clark v. London & Lancashire Indem. Co.*, 21 Wis. 2d 268, 124 N.W.2d 29 (1963)).

²⁰¹ See *supra* notes 37–40 and accompanying text for a discussion of the term "occurrence" as used in the Comprehensive policy.

²⁰² *E.g.*, *Waste Management, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 323 S.E.2d 726, 731 (1984), *rev'd on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986); *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 131, 477 N.E.2d 1227, 1232 (1984); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 713, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983); 11 COUCH, *supra* note 5, § 44.285; Hourihan, *supra* note 30, at 552; Tyler & Wilcox, *supra* note 9, at 499; Note, *supra* note 1, at 914–15. Even under accident based coverage, many courts found that gradual pollution damage was insurable. Soderstrom, *supra* note 39, at 765 n.11.

The *American States* decision is distinct from most other cases concerning the pollution exclusion clause in a number of procedural aspects. The first unusual aspect of this case is that one insurer, American States, began to defend the insured before bringing suit against the other insurers. In defending the insured, American States advanced less than \$65,000, which is a nominal amount in comparison to the potential liability insurers face in most pollution cases. A second quirk was that the sole plaintiff seeking to impose a duty to defend on the remaining insurers was American States. National Drum was a co-defendant with the other insurers. The judgment was for the defendants, holding that none of the insurers had a duty to defend. This result was advantageous to the plaintiff in two ways: first, American States was under no obligation to continue to defend National Drum in the remaining unsettled pollution suits; and second, American States could cite the judgment as favorable precedent in future pollution exclusion clause cases when it seeks to avoid defending insureds. Perhaps not surprisingly, American States has not appealed this decision even though it goes against most other interpretations of the pollution exclusion clause.

²⁰³ See *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33–34 (1st Cir. 1984); *American States*, 587 F. Supp. at 1553; *City of Milwaukee v. Allied Smelting Corp.*, 117 Wis. 2d 377, 385–86, 344 N.W.2d 523, 527 (Ct. App. 1983).

A more systematic analysis of the Comprehensive policy and its pollution exclusion clause would support at least some claims for coverage of gradual contamination.²⁰⁴ In *Buckeye Union Mutual Insurance Co. v Liberty Solvents and Chemicals Co.*, the court was careful to analyze the term "occurrence" separately from the "sudden and accidental" exception.²⁰⁵ The case involved Buckeye's refusal to defend or indemnify Liberty Solvents in the Chem-Dyne Superfund suit.²⁰⁶ Wastes leaking from the Chem-Dyne site had contaminated the soil and water, and the United States and Ohio had sued parties who had left wastes with Chem-Dyne.²⁰⁷ In the suit between Buckeye and Liberty Solvents, the *Liberty Solvents* court first analyzed whether the allegations of gradual pollution in the underlying complaint constituted an occurrence.²⁰⁸ The court concluded that an activity that results in unexpected damage is an occurrence regardless of whether the damage was sudden.²⁰⁹ The court then interpreted the "sudden and accidental" exception to the pollution exclusion clause, because the alleged discharges in the underlying complaint clearly were industrial pollution to which the exclusion applied.²¹⁰ In its review of the Chem-Dyne complaint, the *Liberty Solvents* court found no allegation that compelled it to conclude that Liberty Solvents expected or intended gradual waste leaks.²¹¹ Because the reasonable construction most favorable to the insured of "sudden and accidental" would equate that phrase with "unexpected and unintended," the *Liberty Solvents* court held that Buckeye had to defend Liberty Solvents in the Chem-Dyne suit.²¹²

While both "occurrence" and the "sudden and accidental" exception are part of the definition of coverage,²¹³ they perform different

²⁰⁴ By a systematic approach to pollution exclusion claims, what is meant is interpreting each element of the coverage definition according to its purpose. The elements are the term "occurrence" and the phrases in the pollution exclusion clause. See *infra* 248-58 and accompanying text.

²⁰⁵ 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

²⁰⁶ *Id.* at 128, 477 N.E.2d at 1229-30.

²⁰⁷ *Id.* at 127-28, 477 N.E.2d at 1229.

²⁰⁸ *Id.* at 131, 477 N.E.2d at 1232.

²⁰⁹ *Id.* at 132, 477 N.E.2d at 1233. The *Liberty Solvents* court cited favorably *Grand River Lime Co. v. Ohio Casualty Ins. Co.*, 32 Ohio App. 2d 178, 269 N.E.2d 360 (1972), a significant early national precedent on interpreting whether gradual pollution constituted an occurrence. *Liberty Solvents*, 17 Ohio App. 3d at 131, 477 N.E.2d at 1232-33.

²¹⁰ For a discussion of the type of discharge to which the pollution exclusion clause applies, see the discussion of the clause's "subject matter phrase" *supra* notes 110-35 and accompanying text.

²¹¹ *Liberty Solvents*, 17 Ohio App. 3d at 134, 477 N.E.2d at 1235.

²¹² *Id.*

²¹³ See *supra* notes 37-65 and accompanying text.

functions. "Occurrence" grants coverage for continuous and repeated exposures to conditions.²¹⁴ The "sudden and accidental" exception is part of the pollution exclusion clause,²¹⁵ which is a provision that denies coverage. Ordinarily, under insurance contract construction principles, any provision that denies coverage is limited to its expressed terms.²¹⁶ Such a principle is necessary to avoid defeating the primary purpose of the contract—indemnification of losses.²¹⁷

While courts that find no coverage ostensibly base their decisions upon the common meaning of the phrase "sudden and accidental,"²¹⁸ which they equate to "instantaneous," their decisions do not address other common meanings of that phrase that might suggest a broader coverage that is consistent with the meaning of "occurrence." The policy defines "occurrence" as including continuous events. "Sudden and accidental" can often be equated with unexpected, unintended, and unforeseen, and such meanings encompass continuous as well as instantaneous events.²¹⁹ For example, an activity may be a continuous, regular part of a company's business but the company may not intend or expect the activity to lead to a release into the environment.²²⁰ Whether the release in this instance would be "sudden and accidental" is ambiguous.

Ordinary contract interpretation principles would suggest that ambiguities in meaning be held against the insurer.²²¹ The phrase

²¹⁴ See *supra* notes 37–40 and accompanying text; see also Tyler & Wilcox, *supra* note 9, at 498–99; 1 COUCH, *supra* note 5, § 1.72.

²¹⁵ See *supra* notes 58–64 and accompanying text.

²¹⁶ *E.g.*, *Reliance Ins. Co. v. Martin*, 126 Ill. App. 3d 94, 96, 467 N.E.2d 287, 289 (1984); *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 161, 451 A.2d 990, 992 (L. Div. 1982); 12 COUCH, *supra* note 5, § 44A.3.

²¹⁷ *E.g.*, *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983) ("rather than . . . render[ing] a policy nonsensical or ineffective . . . ambiguity should be resolved so that a doubtful provision in a contract will not unfairly devour the whole policy or relieve the insurer from liability fairly within the spirit of the policy."); 2 COUCH, *supra* note 5, § 15.26.

²¹⁸ See *supra* notes 190–203 and accompanying text.

²¹⁹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 11 (1976) [hereinafter WEBSTER'S THIRD] (accidental defined in part as "happening or ensuing without design, intent, or obvious motivation or through inattention or carelessness"); *id.* at 2284 (sudden defined as "happening without previous notice or with very brief notice[;] coming or occurring unexpectedly[;] not foreseen or prepared for").

²²⁰ See, *e.g.*, *Reliance Ins. Co. v. Martin*, 126 Ill. App. 3d 94, 98, 467 N.E.2d 287, 290 (1984) (spread of exhaust fumes from public garage to adjacent condominium potentially unexpected and unintended, therefore, insurer had duty to defend); *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 164, 451 A.2d 990, 994 (L. Div. 1982) (depositing wastes at a dump intentional but seeping of chemicals from dump site potentially unexpected and unintended from standpoint of a municipal utility); *Liberty Solvents*, 17 Ohio App. 3d at 134, 477 N.E.2d at 1235; Last, *supra* note 3, at 10,254.

²²¹ See *supra* notes 82–97 and accompanying text; see also *Techalloy*, 338 Pa. Super. at 11 n.2, 487 A.2d at 826 n.2 (gossamer thin possibility of coverage sufficient for duty to defend).

"sudden and accidental" is ambiguous because a court can reasonably construe it to mean something other than instantaneous and without human intervention.²²² Constructions favoring coverage for some gradual pollution are more solidly based in insurance law than those decisions that deny coverage because such constructions apply the terms of the policy consistently with the objective intent of the contract.

B. The Burden of Establishing Sudden and Accidental Contamination

Another issue on which courts differ is whether a third party complaint²²³ must mention sudden and accidental pollution in order for the insurer to have a duty to defend.²²⁴ Ordinarily, a court compares the third party complaint to the wording of the policy to determine whether the alleged injury is covered.²²⁵ The problem for courts considering pollution exclusion cases is that third party complaints will often be silent on whether the pollution was sudden and accidental when such an allegation is not a part of an injured party's theory of recovery.²²⁶ Such omissions in the pleadings force a court

²²² *E.g.*, *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 652, 477 N.E.2d 146, 150, *review denied*, 395 Mass. 1102, 480 N.E.2d 24 (1985); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488, 426 N.Y.S.2d 603, 605 (App. Div. 1980); *see* BLACK'S LAW DICTIONARY 14 (5th ed. 1979) ("... an event happening without any human agency, or if happening wholly or partly through human agency an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence; an unusual or unexpected result attending the operation or performance of a usual or necessary act or event ..."). *But see American States*, 587 F. Supp. at 1552.

²²³ The third party complaint is the complaint by the injured party against the insured for which the insured seeks to invoke the duties to defend and indemnify. *See supra* notes 103-04 and accompanying text.

²²⁴ *Compare Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33-34 (1st Cir. 1984) (no coverage absent allegations of sudden and accidental discharge) *with* *Reliance Ins. Co. v. Martin*, 126 Ill. App. 3d 94, 98, 467 N.E.2d 287, 290 (1984) (duty to defend when facts unclear as to whether pollution was sudden and accidental).

²²⁵ *See, e.g.*, *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 224 (Me. 1980); *Smith, Rodburg & Chesler, supra* note 30, at 331.

²²⁶ *See Hourihan, supra* note 30, at 553-54. In cases brought under two major federal statutes addressing hazardous waste releases, the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-6991i (1982 & Supp. III 1985) ("RCRA"), and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (1982) ("CERCLA" or "Superfund"), plaintiffs need not allege sudden and accidental discharges as part of their claims. *See* 42 U.S.C. §§ 6973, 9607 (1982). Thus, in several instances, insurers have had to defend cases against insureds based on these statutes. *See Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064, 1073, 1076 (D. Idaho 1986) (underlying CERCLA case: *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986)); *Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984) (underlying CERCLA case: *United States*

to decide whether the insurer or the insured should bear the burden of the third party's silence.²²⁷

Courts finding for insurers have placed the burden of omissions in third party complaints on the insureds.²²⁸ Such omissions by the injured parties have been termed "significant"²²⁹ and have served as a basis for saying pollution injuries were not sudden and accidental.²³⁰

The difficulty with a court using silence in a third party complaint to deny coverage for a pollution injury is that the burden of establishing that an exclusion clause applies falls ordinarily, and should fall, on the insurer and not the insured.²³¹ Rather than denying coverage when injured third parties fail to allege sudden and accidental injury, customary allocation of burdens would require that

v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983)); *see also* Last, *supra* note 3, at 10,254 (many insurers now defending parties to CERCLA suits); *cf.* CPS Chem. Co. v. Continental Ins. Co., 203 N.J. Super. 15, 20, 495 A.2d 886, 889 (App. Div. 1985) (pendent state law intentional tort claims in a CERCLA suit preclude summary judgment for insured on issue of duty to defend) (underlying CERCLA case: City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982)). *But see* Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) (underlying CERCLA case: United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985)); Waste Management, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (1986), *rev'g*, 72 N.C. App. 80, 323 S.E.2d 726 (1984) (underlying RCRA suit: United States v. Waste Indus., Inc., 734 F.2d 159 (4th Cir. 1984)).

CERCLA claims for reimbursement of the government's response costs under 42 U.S.C. § 9607 also raise the issue of whether these claims are damages in the sense the term is used in the Comprehensive policy. *Compare* Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., 811 F.2d 1180 (8th Cir. 1987) (response costs are insurable damages) *with* Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986) (response costs are not insurable). *See supra* note 65 for a discussion of the different reasoning.

²²⁷ Much of the litigation surrounding the pollution exclusion clause involves the duty to defend. *See supra* notes 72-77 and accompanying text. Cases construing the duty to defend under the clause are often brought on motions for summary judgment that are based on the underlying complaints. *See, e.g.*, Autotronic Sys., Inc. v. Aetna Life & Casualty, 89 A.D.2d 401, 403, 456 N.Y.S.2d 504, 505 (App. Div. 1982); A-1 Sandblasting & Steamcleaning Co., Inc. v. Baiden, 53 Or. App. 890, 892, 632 P.2d 1377, 1378 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982).

²²⁸ *See* American States Ins. Co. v. Maryland Casualty Co., 587 F. Supp. 1549, 1553 (E.D. Mich. 1984).

²²⁹ *Id.* at 1553. The *American States* court noted that the underlying suits did not allege the manner in which the wastes were dumped nor even that the dumping was a regular part of National Drum's operations. Nevertheless, it found "it is significant that it is never even suggested that the dumping was unintended, unexpected, sudden or by accident." *Id.*

²³⁰ *See* Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33-34 (1st Cir. 1984); Waste Management, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, 383 (1986).

²³¹ *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 420-21, 439 N.Y.S.2d 538, 542 (App. Div.), *mot. for lv. to app. dism.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981); *see, e.g.*, Pepper Indus., Inc. v. Home Ins. Co., 67 Cal. App. 3d 1012, 1018, 134 Cal. Rptr. 904, 907-08 (1977); 12 COUCH, *supra* note 5, § 44A.3.

courts deny coverage only if third parties specifically allege that their injuries were not sudden and accidental.²³²

One reason the burden ordinarily falls on the insurer is because under modern notice pleading, a complaint need not fully detail allegations beyond those required to state a cause of action.²³³ As one court noted,

'Precision' is not required in the complaint, and it is not necessary for determining a duty to defend. The correct test is whether a *potential* for liability within the coverage appears from whatever allegations are made

A defendant has no power to amend a complaint which contains an incomplete statement of facts. Whether he can obtain a defense from his insurer must depend not on the caprice of the plaintiff's draftsmanship, nor the limits of his knowledge, but on a *potential* shown in the complaint that the facts ultimately proved may come within the coverage.²³⁴

A vaguely phrased complaint may encompass a covered injury without specifically mentioning that the injury was caused by sudden and accidental pollution.²³⁵ An insured does not control the drafting of the injured party's complaint, therefore the insured has limited ability to clarify ambiguous or omitted allegations.²³⁶ Moreover, the "sudden and accidental" exception is part of an exclusion clause, so the insurer should have to show that the exception is clearly not applicable in order to overcome a presumption in favor of coverage and to exclude coverage for contamination-related injuries.²³⁷ While most courts will allow coverage if the third party complaint alleges potentially unexpected and unintended pollution discharges or inju-

²³² See *supra* note 98-101 and accompanying text.

²³³ *Idaho v. Bunker Hill Co.*, 647 F. Supp. 1064, 1067 (D. Idaho 1986); *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 225 (Me. 1980); *Waste Management, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 323 S.E.2d 726, 730 (1984), *rev'd*, 315 N.C. 688, 340 S.E.2d 374 (1986).

²³⁴ *Dingwell*, 414 A.2d at 226 (emphasis in original). The Maine court first decided that the release of chemicals at the dump site operated by Dingwell may have been sudden and accidental even when the substances allegedly "permeated" the ground and water after release. *Id.* at 224.

²³⁵ See *id.* at 226.

²³⁶ *Id.*; see also *Waste Management, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 323 S.E.2d 726, 730 (1984), *rev'd*, 315 N.C. 688, 340 S.E.2d 374 (1986) (legally sufficient underlying complaints may lack adequate detail to permit a court to determine coverage by precisely comparing the complaint to the insurance policy); cf. *Bunker Hill*, 647 F. Supp. at 1067-68 (insured should not have the burden of clarifying in advance of the underlying litigation whether the complaint states an insurable claim because the costs associated with clarifying a complaint would frustrate a basic purpose of a duty to defend clause—protection of the insured from litigation expenses).

²³⁷ See *Smith, Rodburg & Chesler*, *supra* note 30, at 332; *Tyler & Wilcox*, *supra* note 9, at 513; see also *supra* notes 81-85 and accompanying text.

ries, courts differ on the extent to which allegations or trial findings regarding the foreseeability of contaminant discharges or pollution injuries have an impact on either the duty to defend or the duty to indemnify.

C. Role of Foreseeability in Interpreting the Pollution Exclusion Clause

The final issue on which courts differ is on how foreseeable discharges must be for those discharges and related injuries not to be sudden and accidental.²³⁸ When courts view releases as highly foreseeable, they have denied coverage in a few cases.²³⁹ One court found pollutant discharges highly foreseeable when an insurer warned an insured of the potential for injuries arising out of an industrial process.²⁴⁰ In addition, highly foreseeable risks are those that are plainly apparent to a company even without an insurer's warning.²⁴¹ For example, when a company knew its plant's emissions systems repeatedly failed and the escaped emissions created poor visibility on a public highway, a resulting traffic accident was not sudden and accidental because it was highly foreseeable.²⁴²

Courts do not always address the question of foreseeability when they grant²⁴³ or deny²⁴⁴ coverage. Judge Keeton suggests that highly

²³⁸ Judge Keeton characterized the issue of the impact of foreseeability on the insurability of a risk as a question of the degree of foreseeability. When an outcome is so highly foreseeable that it becomes like a cost of business, then it becomes uninsurable. R. KEETON, *supra* note 24, § 5.3(a).

²³⁹ See *Barmet, Inc. v. Security Ins. Group*, 425 N.E.2d 201 (Ind. Ct. App. 1981); *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A.2d 820 (1984); see also *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984).

²⁴⁰ *Techalloy*, 338 Pa. Super. at 14, 487 A.2d at 827. Reliance Insurance warned Techalloy that its use of trichloroethylene contaminated the groundwater. See *id.* at 6, 487 A.2d at 823. Also, Techalloy knew of the contamination because it had the warned the public of it two years before the third party suit. *Id.* at 14, 487 A.2d at 827. The *Techalloy* court did not ground its decision on this fact, though. Instead, it viewed the continuity of the practice for twenty-five years as proof that the injuries were not "sudden." *Id.*

²⁴¹ See *Barmet*, 425 N.E.2d at 203.

²⁴² *Barmet*, 425 N.E.2d at 202-03. In *Barmet*, the appellate court affirmed the denial of coverage due to the pollution exclusion clause when the trial court determined that the escape of gases that obscured visibility on a highway was foreseeable and resulted in a foreseeable automobile accident. *Id.* Both parties in *Barmet* presented evidence on the operation of the emission filtration system for the gases. *Id.* at 202. The trial court found that the escape was foreseeable and therefore not sudden and accidental. *Id.* at 202-03. The appeals court affirmed because the fact findings were not clearly erroneous and that on the basis of the facts the car crash was foreseeable. *Id.*

²⁴³ In *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990 (L. Div. 1982), the court did not explain why it was not foreseeable that chemicals would leak from a dumpsite into an aquifer.

²⁴⁴ See *Great Lakes Container Corp. v. National Union Fire Ins. Co.*, 727 F.2d 30, 33-34

foreseeable injuries approximate the expected and intended costs of doing business, and therefore should be uninsurable.²⁴⁵ This approach would hold that when a contamination injury is highly foreseeable, it becomes less unexpected and less accidental.²⁴⁶ When a contaminant discharge is highly foreseeable, it too would be less unexpected and unintended. Thus, the Comprehensive policy would not cover highly foreseeable injuries because they would not be "occurrences," and the policy would not cover highly foreseeable industrial discharges into the environment because such discharges would not be "sudden and accidental." Such an interpretation gives meaning to all the terms of the contract²⁴⁷ without eliminating most coverage. The question of foreseeability should be part of a court's systematic analysis of the entire Comprehensive policy.

When a court that seeks to honor all the terms of a Comprehensive policy analyzes whether a contract covers a contamination-related injury, such a court should recognize that the term "occurrence" and the two parts of the pollution exclusion clause address different aspects of the coverage question. A systematic analytical approach to the contract would have courts first assess the breadth of the term "occurrence" to determine what types of injuries the policy would cover absent the exclusion.²⁴⁸ Under this approach, the first question should be whether there was unexpected and unintended damage from the standpoint of the insured.²⁴⁹ Such damage would

(1st Cir. 1984). In *Great Lakes*, it would have been possible for the court to determine from the complaint that Great Lakes had notice and should have foreseen the contamination of the aquifer under the industrial site. The underlying complaint alleged that Great Lakes and other operators of the site discharged chemicals onto the ground over the aquifer and had discontinued using on-site drinking water wells. *Id.* at 33. Pollution was highly foreseeable when the company spilled chemicals it knew to be hazardous onto the site and allowed the wastes to seep into the ground. Actual notice of the hazard can be shown by Great Lakes abandoning use of its own wells for drinking water due to chemical taint. Such an analysis would make the *Great Lakes* court consistent with the majority of pollution exclusion clause opinions but was not expressed as the rationale behind its holding. *See Last, supra* note 3, at 10,254 (Great Lakes consciously permitted known hazardous waste to seep into ground thereby causing predictable contamination; decision consistent with equating sudden with unexpected).

²⁴⁵ R. KEETON, *supra* note 24, § 5.4(c).

²⁴⁶ *Id.*; *see* 11 COUCH, *supra* note 5, § 44.285; Smith, Rodburg & Chesler, *supra* note 30, at 355.

²⁴⁷ *See supra* notes 80–85 and accompanying text.

²⁴⁸ *See* Tyler & Wilcox, *supra* note 9, at 509. *See generally* CPS Chem. Co., Inc. v. Continental Ins. Co., 199 N.J. Super. 558, 489 A.2d 1265 (L. Div. 1984), *rev'd per curiam on other grounds*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985); Buckeye Union Mut. Ins. Co. v. Liberty Solvents & Chems. Co., Inc., 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984), for cases applying the systematic analysis suggested *infra* notes 249–58 and accompanying text.

²⁴⁹ *See supra* notes 36–40 and accompanying text.

be an occurrence.²⁵⁰ If there is an occurrence, then the court's analysis should focus on whether the contaminating discharge that caused the injury is within the subject matter of the pollution exclusion clause.²⁵¹ Under prevailing case law, the pollution exclusion clause would not apply in the following three situations: 1) the contamination arises outside an industrial context;²⁵² 2) the discharge does not enter the land, water or air;²⁵³ or 3) the circumstances surrounding the purchase of the policy indicate that the insured reasonably expected the policy to cover the event.²⁵⁴ Coverage should be permitted in these cases because the cause of the contamination injury would not be a discharge of the type that the pollution exclusion clause describes as its subject matter.²⁵⁵ Finally, if the occurrence is within the subject matter of the pollution exclusion clause, then consideration should turn to the "sudden and accidental" exception.²⁵⁶ If the discharge or discharges in question are unexpected and unintended, then there should be coverage.²⁵⁷ If the discharge that causes injury is expected, intended or highly foreseeable, and is within the subject matter of the pollution exclusion clause, then the clause eliminates coverage.²⁵⁸

Interpreting the contract systematically preserves meaning for all the parts of the contract. The term "occurrence" would grant coverage for a type of injury. The subject matter phrase of the pollution

²⁵⁰ See *supra* notes 45-54 and accompanying text for a discussion of coverage for pollution injuries under "occurrence" policies that had no pollution exclusion clause.

²⁵¹ See *supra* notes 59-61 and accompanying text.

²⁵² See *supra* notes 117-23 and accompanying text.

²⁵³ See *supra* notes 124-30 and accompanying text.

²⁵⁴ See *supra* notes 131-35 and accompanying text.

²⁵⁵ See *supra* notes 136-42 and accompanying text.

²⁵⁶ See *supra* notes 145-73 and accompanying text.

²⁵⁷ See *supra* notes 166-68 and accompanying text.

²⁵⁸ See *Transamerica Ins. Co. v. Sunnes*, 77 Or. App. 136, 711 P.2d 212 (1985), *review denied*, 301 Or. 76, 717 P.2d 631 (1986). The *Sunnes* court distinguished between unintentional damage and intentional discharges when it denied indemnification to a company that discharged acids and caustic wastes into a municipal sewer. See *id.* at 140, 711 P.2d at 214. The insurer had refused to defend or indemnify the business when the city commenced a suit for damage to the sewers. The court recognized that the damage was an occurrence because the parties to the insurance suit stipulated that the damage was unintended by the insured. The parties also had stipulated that the discharges were intentional. The *Sunnes* court denied coverage on the basis of the pollution exclusion clause, because the court recognized that the focus of the pollution exclusion clause is the question of whether the discharge is intentional. *Id.* The court distinguished *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 632 P.2d 1377, *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982), by noting that *Sunnes* involved the discharge of substances specifically mentioned in the pollution exclusion clause. *Sunnes*, 77 Or. App. at 139, 711 P.2d at 214. The *Sunnes* court preserved a meaning for the pollution exclusion clause by recognizing that the clause bars coverage for intentional industrial discharges. See *id.* at 140-41, 711 P.2d at 214.

exclusion clause would exclude coverage for a described type of discharge. The "sudden and accidental" exception would narrow the type of discharge excluded by creating an exception for discharges that arise in a particular manner.

VI. REVISIONS IN THE POLLUTION EXCLUSION CLAUSE UNDER THE COMMERCIAL GENERAL LIABILITY POLICY

In response to the fact that the Comprehensive policy's pollution exclusion clause was ambiguously written, and was therefore ineffective in barring coverage for many contamination-related injuries,²⁵⁹ I.S.O.²⁶⁰ redrafted the pollution exclusion clause in the Commercial General Liability Policy of 1985.²⁶¹ The major changes in the redrafted pollution exclusion clause are the elimination of the "sudden and accidental" exception²⁶² and the rewording of the phrase describing the clause's subject matter.²⁶³ This Comment will analyze the effectiveness of the new pollution exclusion clause first by reviewing the changes in wording.²⁶⁴ Then, it will apply the new language to fact patterns decided under the old pollution exclusion clause to highlight potential interpretive issues.²⁶⁵ Such an application indicates that the redrafted pollution exclusion clause fails to address adequately the basis of several decisions that limited the subject matter of the Comprehensive policy's pollution exclusion clause.

A. Redrafted Language of the Pollution Exclusion Clause

The pollution exclusion clause of the 1985 Commercial policy eliminates all coverage for injuries caused by pollutants emanating from

²⁵⁹ See, e.g., *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 896, 632 P.2d 1377, 1380 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 712, 664 P.2d 1262, 1265, *review denied*, 100 Wash. 2d 1018 (1983); Sparrow, *supra* note 3, at 171; Tyler & Wilcox, *supra* note 9, at 520; see also *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 164-65, 451 A.2d 990, 994 (L. Div. 1982) (alternative language would make coverage issues beyond reasonable question).

²⁶⁰ See *supra* notes 30-32 and accompanying text for a description of ISO.

²⁶¹ Explanatory Memorandum, *supra* note 25, at 1.

²⁶² See *supra* notes 62-64 and accompanying text for this provision in the Comprehensive policy.

²⁶³ See *supra* notes 59-61 and accompanying text for this provision in the Comprehensive policy. An additional major change is the provision for an alternative to coverage based on the term "occurrence"—the so-called "claims made" coverage. Such coverage eliminates "long-tail" liability. See *supra* note 34.

²⁶⁴ See *infra* notes 266-80 and accompanying text.

²⁶⁵ See *infra* notes 281-329 and accompanying text.

certain sources or arising out of certain activities, regardless of whether the contamination was sudden and accidental.²⁶⁶ The new clause reads:

This insurance does not apply to . . .

f.(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) At or from premises you own, rent or occupy;

(b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.²⁶⁷

Under the redrafted pollution exclusion clause, the excluded contamination injury may be the result of alleged or threatened emission of "pollutants" and need not be the result of actual contamination.²⁶⁸ The word "pollutants" is the general term for emissions that the policy will not cover. The policy defines "pollutants" in a separate paragraph set out in text within the pollution exclusion clause.²⁶⁹ In addition, the redrafted pollution exclusion clause specifically mentions that the cost of government-ordered cleanups performed by the insured are not covered.²⁷⁰

²⁶⁶ See Explanatory Memorandum, *supra* note 25, at 5.

²⁶⁷ Commercial Coverage Form, *supra* note 36, at 2 (exclusion f).

²⁶⁸ *Id.* (exclusion f(1)); *cf. supra* note 58 and accompanying text (1973 pollution exclusion).

²⁶⁹ "Pollutants mean . . . any irritant or contaminant, including . . ." Commercial Coverage Form, *supra* note 36, at 2 (exclusion f).

²⁷⁰ *Id.* (exclusion f(2)). The language in exclusion f(2) does not eliminate coverage for all costs associated with CERCLA response actions. The exclusionary language applies to "[a]ny loss, cost, or expense arising out of any governmental direction or request that you . . . clean

The redrafted pollution exclusion clause provides more limits on the types of emissions that general liability insurance covers than the 1973 version.²⁷¹ While its predecessor did not address solid and thermal irritants, the new policy specifically describes these emissions as pollutants.²⁷² Unlike the pollution exclusion clause in the Comprehensive policy, the redrafted clause does not mention that the emission must enter "into or upon land, the atmosphere or any water course or body of water."²⁷³ Instead, the policy eliminates coverage for discharges from a series of specified sites.²⁷⁴ The clause specifies that there is no coverage for discharges from sites an insured owns, rents or occupies, sites used for the handling of waste, and sites on which contractors bring pollutants on an insured's behalf.²⁷⁵ The list of these sites and the inclusion of "pollutants . . . which are . . . transported . . . as waste" is an attempt to exclude coverage for all discharges associated with the "cradle to grave" processing of pollutants.²⁷⁶

up . . . pollutants." *Id.* (emphasis added). Under CERCLA, federal and state governments have the option either to order responsible parties to clean up a site or to clean up a site themselves and then seek reimbursement from responsible parties. 42 U.S.C.A. §§ 9604, 9606, 9607 (West 1983 & Supp. 1987). Thus, if a government chooses the latter response option, then the *government* would not be *directing you*, the responsible party, to clean up pollutants. If the government performs the cleanup and seeks reimbursement, then the costs of reimbursement may be insurable. *See Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180 (8th Cir. 1987). *But see Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1985) (alternate holding). Exclusion f(2) would not eliminate insurer liability under the citizen suit provision of the amendments to CERCLA passed by the 99th Congress. *See Superfund Amendments and Reauthorization Act of 1986*, Pub. L. No. 99-499, § 206, 1986 U.S. CODE & ADMIN. NEWS (100 Stat.) 1613, 1703 (to be codified at 42 U.S.C. § 9659). Costs imposed on a defendant in a citizen suit would not arise out of "*governmental direction or request*" and therefore are not excluded from coverage by reason of exclusion f(2).

If exclusion f(1) or the basic insurance agreement eliminated all CERCLA liability, then exclusion f(2) would be redundant and there would be coverage for neither citizen suits nor governmental requests for reimbursement. If exclusion f(2) is not redundant, then insurers may be liable for costs associated with CERCLA citizen suits and governmental response actions.

²⁷¹ *Cf. supra* notes 59-61 and accompanying text.

²⁷² *Cf. supra* note 58 and accompanying text.

²⁷³ *See supra* notes 58-61 and accompanying text.

²⁷⁴ Commercial Coverage Form, *supra* note 36, at 2 (exclusion f(1)(a)-(d)).

²⁷⁵ *Id.*

²⁷⁶ The language of exclusion f(1)(c) appears to include specifically those situations where waste was turned over to another company for disposal. *See American States Ins. Co. v. Maryland Casualty Co.*, 587 F. Supp. 1549 (E.D. Mich. 1984); *CPS Chem. Co. v. Continental Ins. Co.*, 199 N.J. Super. 558, 489 A.2d 1265 (L. Div. 1984), *rev'd*, 203 N.J. Super. 15, 495 A.2d 886 (App. Div. 1985); *Waste Management, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 323 S.E.2d 726 (1984), *rev'd*, 315 N.C. 688, 340 A.2d 374 (1986); *Buckeye Union Mut. Ins. Co. v. Liberty Solvents & Chems. Co.*, 17 Ohio App. 3d 127, 477 N.E.2d 1227 (1984).

The most prominent revision in the pollution exclusion clause of the 1985 Commercial policy is the elimination of the "sudden and accidental" exception.²⁷⁷ This change alone eliminates many of the ambiguities cited by courts that found coverage under the pollution exclusion clause of the 1973 Comprehensive policy.²⁷⁸ As discussed,²⁷⁹ however, several courts decided cases on the basis of the old pollution exclusion clause's subject matter phrase and not on the basis of the exclusion's "sudden and accidental" exception.²⁸⁰ The next section will analyze fact patterns of cases under the Comprehensive policy to determine whether the wording of the Commercial policy would restrict coverage in similar situations.

B. Effectiveness of the Redrafted Clause as a Limit on Coverage

The omission of the "sudden and accidental" exception from the redrafted pollution exclusion clause in the Commercial policy does not eliminate all grounds on which courts found coverage for contamination injuries under the old policy.²⁸¹ Through consideration of the old pollution exclusion clause's scope, courts found coverage on three additional grounds: (1) the pollution was non-industrial,²⁸² (2) the contamination was non-environmental,²⁸³ or (3) the injury was reasonably expected to be covered.²⁸⁴

²⁷⁷ Explanatory Memorandum, *supra* note 25, at 5; *cf. supra* notes 62-64 and accompanying text.

²⁷⁸ See *supra* notes 145-247 and accompanying text.

²⁷⁹ See *supra* notes 110-35 and accompanying text.

²⁸⁰ See, e.g., *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479 (3d Cir. 1981); *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95 (Ala. 1977); *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 632 P.2d 1377 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982); see also *Smith, Rodburg & Chesler*, *supra* note 30, at 350-52; Note, *supra* note 11, at 1258 n.105.

²⁸¹ See *supra* notes 110-35 and accompanying text.

²⁸² *Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95, 99 (Ala. 1977); *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 89 A.D.2d 401, 409, 456 N.Y.S.2d 504, 506 (App. Div. 1982); *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 420-21, 439 N.Y.S.2d 538, 541-42 (App. Div.), *mot. for lv. to app. dismiss.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981); see *supra* notes 110-23 and accompanying text.

²⁸³ *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479, 483 (3d Cir. 1981); *Connor v. Farmer*, 382 So. 2d 1069, 1069-70 (La. Ct. App.), *cert. denied*, 385 So. 2d 267 (La. 1980); *Clement v. Taylor*, 382 So. 2d 231, 234 (La. Ct. App. 1980); see *supra* notes 124-30 and accompanying text.

²⁸⁴ *Niagara County* at 419-20, 439 N.Y.S.2d at 541; *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 489, 439 N.Y.S.2d 603, 605 (App. Div. 1980); *A-1 Sandblasting & Steamcleaning Co. v. Baiden*, 53 Or. App. 890, 894, 632 P.2d 1377, 1379 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982); see *supra* notes 131-35 and accompanying text.

The redrafted pollution exclusion clause does not clearly preclude courts from utilizing these same three grounds to find coverage for a pollution-related injury.²⁸⁵ The ambiguities underlying these three grounds still remain. The first ambiguity concerns whether the description of the terms "irritant or contaminant" so closely approximates the language of the old policy that these terms continue to encompass only industrial emissions.²⁸⁶ A second ambiguity is whether the use of the term "pollutant" still implies that only environmental pollution injuries are not covered.²⁸⁷ A third ambiguity concerns the effect of the redrafted language on the reasonable expectations of insureds.²⁸⁸ These ambiguities are apparent when one applies the new pollution exclusion clause to the fact patterns of cases that focused on the initial subject matter phrase of the 1973 policy's pollution exclusion clause.²⁸⁹

Non-industrial pollution may not be an "irritant or contaminant" as defined by the new pollution exclusion clause and therefore injuries related to these emissions may continue to be covered as before.²⁹⁰ The definition of "pollutant" in the redrafted clause appears designed to eliminate the *ejusdem generis*²⁹¹ rationale behind the *Molton, Allen and Williams, Inc. v. St. Paul Fire and Marine Insurance Co.* holding, which found coverage when non-industrial pollution led to environmental injuries.²⁹² In *Molton*, sand runoff from a land development covered adjacent properties and polluted three lakes.²⁹³ While the run-off injured the environment, the *Molton* court concluded that the runoff was not industrial pollution of the sort described by the pollution exclusion clause.²⁹⁴ The *Molton* court viewed the 1973 pollution exclusion clause's specific mentioning of "smoke, vapors, soot, fumes, acids, alkalis, [and] toxic chemicals" as limiting the general terms "irritants, contaminants or pollutants" to industrial pollution because specific items suggestive of industrial

²⁸⁵ See *infra* notes 290-329 and accompanying text.

²⁸⁶ See *infra* notes 290-306 and accompanying text.

²⁸⁷ See *infra* notes 307-17 and accompanying text.

²⁸⁸ See *infra* notes 318-25 and accompanying text.

²⁸⁹ While the various cases decided on the basis of the "sudden and accidental" exception to the old pollution exclusion would probably be litigated differently had the new language been used in those cases, for purposes of this discussion, it is assumed that the revised language would block recovery for insureds.

²⁹⁰ See *supra* notes 117-23 for a discussion of this limitation on the subject matter of the old pollution exclusion clause.

²⁹¹ See *supra* notes 86-92 and accompanying text.

²⁹² 347 So. 2d 95, 98-99 (Ala. 1977).

²⁹³ *Id.* at 96-97.

²⁹⁴ See *id.* at 99.

by-products preceded the general terms.²⁹⁵ In the 1985 pollution exclusion clause, the definition of "pollutant" is "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."²⁹⁶ The general terms "any . . . irritant or contaminant" precede, rather than follow, the specifically identified items. Therefore, *ejusdem generis* is not applicable. The doctrine of *ejusdem generis*, however, is only a narrow example of a broader rule that specific words constrain the meaning of general terms when both types of terms are grouped together.²⁹⁷ The 1985 pollution exclusion clause still mentions the same emissions as the 1973 clause, so the new wording may still be limited to industrial pollution.²⁹⁸

Insurers may continue to be bound to defend an insured when the insured caused injury by some means other than "actual, alleged or threatened" discharge.²⁹⁹ Some courts held under the 1973 Comprehensive policy that insureds were covered because they were not "actual polluters."³⁰⁰ The redrafted pollution exclusion clause seems directed at these cases. It only requires that a contamination injury "aris[e] out of actual, alleged or threatened discharge . . . of pollutants" for the clause to bar coverage.³⁰¹ However, under the 1985 policy's language, courts may decide to restrict uninsurable injuries to those directly associated with contamination, as courts have so interpreted the 1973 policy to mean.³⁰² Both policies attempt to exclude coverage for injuries that "arise" out of emissions, but courts have allowed for coverage under the 1973 policy when the third-party plaintiffs claim their injuries are the indirect result of contamination.³⁰³ Courts may continue to limit coverage in a similar manner

²⁹⁵ See *id.* at 98-99.

²⁹⁶ Commercial Coverage Form, *supra* note 36, at 2.

²⁹⁷ 2 COUCH, *supra* note 5, § 15.71.

²⁹⁸ See *supra* note 267 and accompanying text (new clause text); *cf. supra* note 58 and accompanying text (old clause text).

²⁹⁹ Commercial Coverage Form, *supra* note 36, at 2; see text accompanying note 228.

³⁰⁰ See *Autotronic Sys., Inc. v. Aetna Life & Casualty*, 89 A.D.2d 401, 403, 456 N.Y.S.2d 504, 505 (App. Div. 1980); *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 418, 439 N.Y.S.2d 538, 540 (App. Div.), *mot. for lv. to app. dismissed*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983).

³⁰¹ For the text of the new pollution exclusion clause, see *supra* note 267 and accompanying text.

³⁰² See, e.g., *Pepper Indus., Inc. v. Home Ins. Co.*, 67 Cal. App. 3d 1012, 1019, 134 Cal. Rptr. 904, 908 (1977) (Comprehensive policy covers blast damage because such damage is distinguishable from oil contamination injuries).

³⁰³ E.g., *Clement v. Taylor*, 382 So. 2d 231, 234 (La. Ct. App. 1980) (injuries due to explosion caused by gas leak insurable).

under the 1985 policy. For example, under the 1985 policy language, a court may hold that injuries due to the negligent construction of a gas station³⁰⁴ or the failure to warn a land purchaser of latent toxins in the property³⁰⁵ arise most directly out of building or miscommunication and not out of "actual, alleged or threatened" emissions. The new pollution exclusion clause may not eliminate coverage for these injuries because they are not caused by the insured's discharge of a contaminant or irritant.³⁰⁶

Decisions finding coverage under the 1973 Comprehensive policy for non-environmental contamination³⁰⁷—contamination that does not enter the land, water or atmosphere—may be more difficult to sustain under the 1985 pollution exclusion clause than decisions finding coverage for non-industrial pollution because the new language omits direct references to discharges into the land, water or air.³⁰⁸ A court would have to imply a requirement of entry into the environment from the phrase "discharge, dispersal, release or escape of pollutants."³⁰⁹ The term "pollutant" may have connotations of pollution.³¹⁰ The term is not set in special print to indicate that it is being used in an unusual manner,³¹¹ so there is an opportunity for judicial construction of "pollutant" according to its ordinary usage.³¹² The term is defined in the new pollution exclusion clause immediately after its use, so a court may find it is clear from the context that the term is being used as defined.³¹³ If a court does not imply a requirement of emission into the environment, then "escape" may be limited

³⁰⁴ *Autotronic*, 89 A.D.2d at 404, 456 N.Y.S.2d at 506.

³⁰⁵ *Niagara*, 80 A.D.2d at 420, 439 N.Y.S.2d at 541-42.

³⁰⁶ The use of the phrase "actual polluter" in cases under the 1973 Comprehensive policy's pollution exclusion clause implies an intentional output of an industrial process. *E.g.*, *Molton*, 347 So. 2d at 99; *Tyler & Wilcox*, *supra* note 9, at 506. The definition of pollutant in the 1985 policy may still imply an industrial operation. *See infra* notes 307-17 and accompanying text. Interpreting the 1985 clause as a whole would still suggest that the clause only applies to industrial emissions.

³⁰⁷ *See supra* notes 124-30 and accompanying text.

³⁰⁸ For a comparison of the new pollution exclusion clause language with the old, compare *supra* note 267 and accompanying text (new), with *supra* note 58 and accompanying text (old).

³⁰⁹ *Cf.* *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, 640 F.2d 479, 483 (3d Cir. 1981) (under old clause, complaint must allege discharge into environment for clause to apply); *Connor v. Farmer*, 382 So. 2d 1069, 1069-70 (La. Ct. App.), *cert. denied*, 385 So. 2d 267 (La. 1980) (under old clause, worker's silicosis not excluded because "injury . . . arise[s] not from the discharge of sandblasting matter into the atmosphere" (emphasis original)).

³¹⁰ WEBSTER'S THIRD, *supra* note 219, at 1756 (pollutant is "something that pollutes").

³¹¹ *See supra* note 79 and accompanying text.

³¹² *See generally supra* notes 82-97 and accompanying text for a discussion of various principles of insurance contract interpretation.

³¹³ *See* 2 COUCH, *supra* note 5, § 15.29.

to escape from a container or enclosure.³¹⁴ For example, in *C.H. Heist Caribe Corp. v. American Home Assurance Co.*, the insurer had to defend C.H. Heist when toxic fumes contained in a tank injured a worker while he was cleaning the tank.³¹⁵ Because the injured worker did not allege that the fumes escaped the tank, the old pollution exclusion clause did not eliminate coverage.³¹⁶ Under the new pollution exclusion clause, workplace contamination may still be covered because there would be no escape from the premises or from a container.³¹⁷

The redrafting of the pollution exclusion clause may limit the reasonable expectations of consumers as to their coverage, but like the decisions concerning non-industrial pollution³¹⁸ and non-environmental contamination,³¹⁹ some injuries may still be reasonably expected to be covered despite the new language.³²⁰ Much of the potential confusion may concern what a reasonably prudent purchaser of insurance in the position of the insured would expect to be considered an irritant or contaminant. The nature of the business buying the insurance and the property being insured will still affect expectations.³²¹ Reviewing a Comprehensive policy, the *A-1 Sandblasting and Steamcleaning Co. v. Baiden*³²² court expressed the view that a product that was in common use and that was not usually considered a contaminant was not one for purposes of the old pollution exclusion clause when a business used the product normally.³²³ The description of pollutant in the new pollution exclusion clause is not so different that it would prevent a similar construction by a court.³²⁴

³¹⁴ See WEBSTER'S THIRD, *supra* note 219, at 774 (escape means "to issue from confinement or an enclosure esp[ecially] by way of a break").

³¹⁵ 640 F.2d 479, 483 (3d Cir. 1981).

³¹⁶ *Id.*

³¹⁷ See *Connor v. Farmer*, 382 So. 2d 1069, 1069-70 (La. Ct. App.), *cert. denied*, 385 So. 2d 267 (La. 1980) (worker developing silicosis from on site sandblasting covered because injuries not due to discharge into environment; injuries caused by lack of protective equipment).

³¹⁸ See *supra* notes 290-306 and accompanying text.

³¹⁹ See *supra* notes 307-17 and accompanying text.

³²⁰ See *supra* notes 131-35 and accompanying text.

³²¹ See *R. KEETON*, *supra* note 24, § 6.3(a); *cf.* *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 489, 426 N.Y.S.2d 603, 605 (App. Div. 1980) (under Comprehensive policy, insurer covered tank leak when policy expressly insures tanks); *United Pac. Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 714, 664 P.2d 1262, 1266, *review denied*, 100 Wash. 2d 1018 (1983) (under Comprehensive policy, gas station insured for leak because it was not an active polluter).

³²² 53 Or. App. 890, 632 P.2d 1377 (1981), *aff'd*, 293 Or. 17, 643 P.2d 1260 (1982).

³²³ 53 Or. App. at 894, 632 P.2d at 1379. The specific product in this instance was paint.

³²⁴ Compare Commercial Coverage Form, *supra* note 36, at 2 (exclusion f) ("Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor,

If the purpose for purchasing an insurance policy was to cover a particular piece of property for a particular risk, a court may be reluctant to permit an insurer to evade the duties to defend and indemnify by use of the redrafted pollution exclusion clause.³²⁵

The redrafted pollution exclusion clause may not have eliminated all of the ambiguities that were in the pollution exclusion clause of the 1973 Comprehensive policy.³²⁶ The new policy has eliminated the ambiguous "sudden and accidental" exception, but further ambiguities remain. The definition of pollutant³²⁷ in the new pollution exclusion clause may still imply that only injuries from industrial environmental pollution whose coverage cannot reasonably be expected are not in fact covered.³²⁸ Coverage may continue as before for other types of contamination-related injuries.³²⁹

VII. REAPPRAISING THE IMPACT OF COVERAGE DECISIONS ON INCENTIVES TO ABATE POLLUTION

Interpretations of coverage under the Comprehensive and the Commercial policies affect the economic incentives to abate or limit pollution.³³⁰ Implicit in some of the holdings of the few cases that interpreted the 1973 pollution exclusion clause to limit coverage is the view that denying coverage helps achieve society's goal of a cleaner environment.³³¹ Most commentators analyzing the pollution exclusion clause of the 1973 Comprehensive policy share this view.³³² Even many of the decisions that found the insured covered acknowledge that coverage sometimes may hurt efforts to eliminate pollu-

soot, fumes, acids, alkalis, chemicals and waste") with 1 COUCH, *supra* note 5, § 1.72 (Comprehensive policy, including its pollution exclusion clause) (" . . . smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants . . . ").

³²⁵ See 1 COUCH, *supra* note 5, § 5.2.

³²⁶ See *supra* notes 290-325 and accompanying text.

³²⁷ See *supra* note 267 and accompanying text.

³²⁸ See *supra* notes 290-325 and accompanying text.

³²⁹ See *supra* notes 117-35 and accompanying text.

³³⁰ See *infra* notes 331-57 and accompanying text.

³³¹ See *American States Ins. Co. v. Maryland Casualty Co.*, 587 F. Supp. 1549, 1553 (E.D. Mich. 1984) (court finds its holding reinforced by the policy behind the pollution exclusion clause, which is the prevention of industries seeking insurance instead of stopping pollution); *Waste Management, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374, 381 (1986) (insureds who can pass on liability will be lax in guarding against pollution).

³³² See, e.g., *Adler & Broiles*, *supra* note 11, at 1251; *Tyler & Wilcox*, *supra* note 9, at 520; Note, *supra* note 11, at 1239-40.

tion.³³³ Yet most courts limit the effectiveness of the 1973 pollution exclusion clause³³⁴ and may do the same to the redrafted clause in the Commercial policy.³³⁵ Decisions that grant coverage for contamination injuries do not necessarily conflict with society's goal of limiting pollution. It may often be the case that granting coverage will provide both the insurer and the insured a greater economic incentive to limit pollution than will denying coverage. To the extent that an insurer sets insurance premiums to reflect a business firm's disposal practices, the premiums will help internalize the costs of improper waste disposal on a firm-by-firm basis.³³⁶

One commonly expressed belief is that by denying coverage courts and insurers force polluters to bear the full cost of pollution.³³⁷ These authorities fear that finding coverage would permit a polluting company to continue operations without a strong financial incentive to abate its pollution.³³⁸ The cost to the polluter would be limited to its premium payments if the contamination injuries were covered.³³⁹

However, when a company is faced with insolvency because of a pollution-related liability, denying coverage may be too powerful a device to serve as an incentive to curtail pollution. If a polluter lacked sufficient assets to pay for the cost of pollution injuries, then the polluting company would only bear the cost of pollution to the extent of its assets.³⁴⁰ Any costs beyond a company's assets would

³³³ *Niagara County v. Utica Mut. Ins. Co.*, 80 A.D.2d 415, 418, 439 N.Y.S.2d 538, 540 (App. Div.), *mot. for lv. to app. dism.*, 54 N.Y.2d 608, 427 N.E.2d 1191, 443 N.Y.S.2d 1030 (1981); *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 487-88, 426 N.Y.S.2d 603, 604 (App. Div. 1980).

³³⁴ See *supra* notes 102-73 and accompanying text.

³³⁵ See *supra* notes 259-329 and accompanying text for potential interpretive issues concerning the 1985 Commercial policy.

³³⁶ See Comment, *Compensating Hazardous Waste Victims: RCRA Insurance Regulations and a Not So "Super"fund Act*, 11 ENVTL. L. 689, 710 (1981); Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 597-98 & n.63 (1981).

³³⁷ *E.g.*, Hurwitz & Kohane, *supra* note 31, at 379. Hurwitz and Kohane quote Governor Nelson Rockefeller of New York when he approved legislation mandating the pollution exclusion clause in New York insurance contracts. See 1971 N.Y. Laws 765 (originally codified at N.Y. INS. LAW § 46(13)-(14)). The Governor said that the statute would "prohibit commercial and industrial enterprises from purchasing insurance to protect themselves against liabilities arising out of their pollution of the environment where such prohibition is an appropriate measure of environmental protection." Hurwitz & Kohane, *supra* note 31, at 379. The 1971 provision mandating the pollution exclusion was repealed in 1982. 1982 N.Y. Laws 856.

³³⁸ See Soderstrom, *supra* note 39, at 767.

³³⁹ See generally Kunzman, *supra* note 34, at 478.

³⁴⁰ Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 602 (1983) ("A corporation will be indifferent between enormous liability and lesser liability if *both* would

have no economic impact on a polluter's decisionmaking, since the company would never have to pay for these costs.³⁴¹ One commentator has characterized this phenomena as the "deterrence trap."³⁴² The deterrence trap frequently permits active businesses to avoid considering the effects of their pollution because the size of pollution liabilities often exceeds their assets.³⁴³ Furthermore, polluting companies are often out of business before the contamination injuries they have caused become apparent.³⁴⁴ The public or the injured parties will bear the costs of pollution that exceed polluters' assets.³⁴⁵ The full costs of pollution will not be borne by polluters in these situations.³⁴⁶

bankrupt it" (emphasis original)). One commentator described the availability of bankruptcy in environmental liability cases as "[t]he ultimate in self-insurance." *Developments in the Law*, *supra* note 3, at 1585. In bankruptcy, a firm finances its liabilities arising out of environmental injuries by imposing upon injured parties the excess of the costs of these injuries over the assets of the bankrupt firm. *See id.* at 1574.

³⁴¹ Amicus Curiae Brief of the Commonwealth of Massachusetts in Support of Plaintiff-Appellee at 5-6, *Shapiro v. Public Serv. Mut. Ins. Co.*, 19 Mass. App. Ct. 648, 477 N.E.2d 146 (No. 83-1366), *review denied*, 395 Mass. 1102, 480 N.E.2d 24 (1985) [hereinafter *Shapiro Amicus Brief*]; *cf.* Note, *supra* note 340, at 601 (a firm that anticipates it will be defunct when the harm occurs may discount the amount necessary to compensate parties for its environmental liability by the probability that it will escape liability altogether).

³⁴² Note, *supra* note 340, at 601-02.

³⁴³ *Id.* In the area of hazardous waste, one 1979 study for the Environmental Protection Agency determined that 64% of hazardous waste sites were privately owned but financially non-viable. FRED C. HART ASSOCIATES, PRELIMINARY ASSESSMENT OF CLEANUP COSTS FOR NATIONAL HAZARDOUS WASTE PROBLEMS (EPA Contract No. 68-01-5063, 1979), *cited in* Fisher, *The Toxic Waste Dump Problem and a Suggested Insurance Program*, 8 B.C. ENVTL. AFF. L. REV. 421, 427 (1980); *see also* *Developments in the Law*, *supra* note 3, at 1574 n.2 (in recent years in New Jersey, there have been 10 major cases per year involving bankruptcy filings by firms seeking to avoid environmental liabilities). Regulations pursuant to 42 U.S.C. § 6924(6) of RCRA affect insurance requirements for new and ongoing waste sites. 40 C.F.R. §§ 264.147, 265.147 (1986) (redesignated 40 C.F.R. §§ 264.148, 265.148 by 51 Fed. Reg. 37,854 (1986)).

For a discussion of the impact of the Resource Conservation Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6991i (1982 & Supp. III 1985) and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601-9657 (1982) *as amended* by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1613, on coverage under the Comprehensive policy, *see supra* notes 2, 65, 204-12, 226, 270 and accompanying text.

In areas other than hazardous waste, the business that polluted may not be capable of compensating victims. *See Shapiro Amicus Brief*, *supra* note 341, at 6 n.5.

³⁴⁴ *Shapiro Amicus Brief*, *supra* note 341, at 5 & n.4; *see, e.g.*, *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 811 F.2d 1180, 1183, 1184 n.8 (8th Cir. 1987) (Northeastern Pharmaceutical defunct in 1974, initial contamination discovered in 1980).

³⁴⁵ *Shapiro Amicus Brief*, *supra* note 341, at 5 & n.4.

³⁴⁶ *Cf.* Note, *supra* note 336, at 597 (full internalization of cleanup and compensation costs impossible if responsible parties are effectively insulated from liability); Note, *supra* note 340, at 601-02 (discussing various ways firms underestimate the costs of pollution).

By interpreting pollution exclusion clauses as permitting coverage for contamination injuries, the cost of these injuries would be reflected in premium charges.³⁴⁷ In effect, when the insured pays premiums in proportion to the risk of covered injury, the insured *already* is paying for the full cost of pollution.³⁴⁸ Insurers pass on the costs of coverage to each company in proportion to the magnitude and probability of the harm each company may cause.³⁴⁹ Due to the fact that from 1975 onward most decisions interpreting the Compre-

³⁴⁷ See Comment, *supra* note 336, at 710; *Developments in the Law*, *supra* note 3, at 1578. Kunzman discusses some of the difficulties in setting premiums for pollution coverage. Principle difficulties in setting premiums that properly internalize the costs of waste disposal include: 1) the lack of insurer experience with pollution claims; 2) the impact of changing technologies on the waste disposal industry, as well as on waste generation and transportation; 3) the diversion of insurers' resources into "regulatory" functions, such as research into the effectiveness of abatement processes, and away from the low cost delivery of risk-spreading. See generally Kunzman, *supra* note 34, at 481-87. Despite the difficulties in setting proper premiums, Kunzman recognizes that insurers still have a role in evaluating the risks of pollution associated with industrial processes and in the provision of indemnity for pollution-related injuries. *Id.* at 487-88.

³⁴⁸ Clearly, this is not to say that when pollution damage becomes so certain that it may be seen as an operating cost of the business, it is an insurable risk. Cf. R. KEETON, *supra* note 24, § 5.3(a). Rather, this is merely a recognition of the fact that underwriters balance the likelihood of a loss and its possible magnitude in such a way that in the aggregate premiums pay for the costs to the insurers.

³⁴⁹ A hypothetical example will illustrate how construing a general liability insurance policy to allow for coverage of some pollution injuries would promote the public's goal of deterring pollution. Consider a company that has net assets of \$3,000,000 and an annual income of \$600,000. This company has a likelihood of having a contamination-related occurrence once in forty years. If the company takes no precautions to minimize the severity of the occurrence, the cost of the related injuries will be \$10,000,000. Its expected income would be the probability of earning its annual income less the probability of losing all its assets as a result of an occurrence. This would be \$510,000, or $(\$600,000 \times 39/40) - (\$3,000,000 \times 1/40)$.

Assume that the company could spend \$400,000 and lower the gravity of the potential injury from \$10,000,000 to \$3,000,000. If the company could not obtain insurance under the so-called "polluter pays" public policy principle, the company would not spend the \$400,000 to reduce the gravity of the potential injury. The company would not take the precautions because the company would go bankrupt in the event of an occurrence whether or not it spent the \$400,000. Even though one occurrence causes more than three times as grave an injury as the other, both would have the same impact on the company's finances. If the company could obtain insurance, it would be more likely to spend the \$400,000 than if it could not obtain insurance. The insurance premium would be based on the gravity and the likelihood of loss plus some profit for the insurer. If the company spent the \$400,000, the premium would be approximately \$75,000, or $(\$3,000,000 \times 1/40)$. Spreading the cost of the \$400,000 improvement over its estimated useful life would impose an annualized cost of \$10,000, or $(\$400,000 \times 1/40)$. Because the company would not be exposed to bankruptcy, the company's estimated income would be \$515,000 per year less the insurer's profit, or $(\$600,000 \times 40/40) - \$75,000 - \$10,000$. Assuming the company's managers would like to stay in business in order to preserve their jobs, and also assuming that management prefers a more reliable income stream to a more risky one, then management would want to make the \$400,000 expenditure and obtain insurance even if the insurer's profit somewhat lessens the company's expected profits.

hensive policy had found coverage for the insured, premiums after 1975 for that policy may have reflected a belief that insurers would be bound to defend and indemnify insureds.³⁵⁰ To deny coverage when the insurer set premiums expecting to cover certain pollution injuries would provide insurers with a windfall.

An additional advantage in making the insurance company pay for the costs of pollution is to utilize the insurance industry's expertise in loss prevention to minimize the possibilities of environmental damage.³⁵¹ Insurers have facilities that evaluate risks and suggest ways businesses may operate with less potential for harm.³⁵² If the insurance industry is allowed to avoid easily any liability for pollution damage, there would be no incentive for the industry to use its resources in the fight against pollution.³⁵³ Allowing coverage will make it likely that insurers will inspect policyholders³⁵⁴ and insist upon precautions to prevent contamination damage prior to the issuance or renewal of a policy.³⁵⁵ Such insurer vigilance would both help prevent contamination through detection and elimination of pollution risks and also aid insurance companies in establishing that an event was expected and not covered.³⁵⁶ Thus, an insurer could minimize the costs of pollution and the costs of insurance by monitoring insureds.³⁵⁷ Because holding that general liability policies cover pollution-related injuries would bring the skills of the insurance industry to bear upon pollution prevention, a broad interpre-

³⁵⁰ It is possible that American States assumed that under the normal construction of the pollution exclusion it had a duty to defend National Drum. It may have settled cases quickly for small amounts believing that all the insurers had a duty to defend and would make it up in costs. See *American States*, 587 F. Supp. at 1550-51; see also Last, *supra* note 3, at 10,254 ("More and more insurers are now defending Superfund claims under [Comprehensive] policies.").

Another indication that the insurance industry recognized that the Comprehensive policy covered many emission injuries is the effort to redraft the pollution exclusion clause in the Commercial policy.

³⁵¹ Soderstrom, *supra* note 39, at 772.

³⁵² *Id.*; see Sparrow, *supra* note 3, at 173; *Developments in the Law*, *supra* note 3, at 1579 n.40.

³⁵³ See Soderstrom, *supra* note 39, at 772.

³⁵⁴ Shapiro Amicus brief, *supra* note 341, at 3 & n.2; see *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 14, 487 A.2d 820, 827 (1984). Reliance identified the risk of trichloroethylene exposure more than a year prior to the third party suit.

³⁵⁵ See Comment, *supra* note 336, at 710-11 (waste disposal facilities that use improper disposal methods will not be able to obtain insurance and therefore may not be able to meet regulatory requirements for financial responsibility).

³⁵⁶ See *Techalloy*, 338 Pa. Super. at 14, 487 A.2d at 827; Comment, *supra* note 336, at 711; see also *supra* notes 238-47 and accompanying text.

³⁵⁷ See Kunzman, *supra* note 34, at 486.

tation of coverage may help curtail pollution more efficiently than a narrow interpretation of coverage.

VIII. CONCLUSION

Courts that have limited the ability of the Comprehensive policy's pollution exclusion clause to bar coverage for pollution-related injuries have interpreted the entire insurance policy consistently with general principles of insurance contract law. Ambiguity in both the clause's "subject matter" phrase, which described the scope of potentially excludable contamination, and the clause's "sudden and accidental" exception, which limited the types of potentially uninsurable discharges, demanded that courts treat many pollution-related injuries as insurable. A systematic approach to interpreting the Comprehensive policy—one that first determines whether an injury was an "occurrence" and then analyzes the entire pollution exclusion clause—would illustrate to a court the ambiguities in the clause. Due to potential ambiguities in the new clause's scope language, the 1985 Commercial policy's pollution exclusion clause may still be ambiguous despite removal of the Comprehensive policy's "sudden and accidental" exception.

While many commentators and courts suggest that denying coverage under general business liability insurance policies for pollution-related injuries would provide the greatest incentives to limit pollution, in many instances finding coverage would lead to adequate victim compensation, conservation of government funds, and less pollution. The most effective way to involve insurers in efforts to limit pollution under both the Comprehensive policy and the Commercial policy would be to interpret the pollution exclusion clause narrowly. When courts consistently interpret the clauses narrowly, they enable insurers to set policy premiums at levels that force all companies to internalize accurately the costs of their pollution.